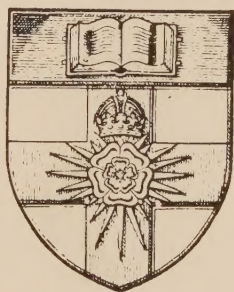


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IN

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THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1909.

VOL. I.

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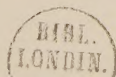
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Lord Chancellor.

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CHARLES A. O'CONNOR, K.C.

[These Reports will be cited as follows :—[1909] 1 I. R.]

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Land Judge, ... D. M. STEEN, Barrister-at-law.

Land Commission, . . JOHN EDWD. WALSH, Barrister-at-law.

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CORRIGENDA.

Page 77, line 1 of head-note, for "[1905]" read "[1895]."

„ 79, foot-note, for "[1905]" read "[1895]."

MEMORANDA.

On the 14th October, 1909, THE RIGHT HON. LORD JUSTICE FITZ GIBBON died.

THE RIGHT HON. R. R. CHERRY, His Majesty's Attorney-General, was appointed a Lord Justice of Appeal.

REDMOND J. BARRY, Esq., K.C., His Majesty's Solicitor-General, was appointed Attorney-General.

CHARLES A. O'CONNOR, Esq., K.C., His Majesty's First Serjeant-at-Law, was appointed Solicitor-General.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1909.

IN THE MATTER OF THE ESTATE OF ARTHUR C. S.
CLELAND.

Wylie, J.
1908.

Mar. 3, 5, 6,
16.

Appeal.

Nov. 12, 16.

Settlement—Life estate subject to overriding power of appointment—Exercise of power—Effect—Life estate made determinable on happening of certain events—Forfeiture—Power to charge—Charge of eight years' arrears of pin-money—Registration of judgment mortgage—Validity of—English judgment extended to Ireland under Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), sect. 4, "execution"; sect. 1, costs of obtaining and registering certificate—Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), s. 6—Affidavit of judgment—Omission therefrom of costs of obtaining and registering certificate.

By settlement made in 1886, J. C., father of A. C., and A. C. granted certain lands to trustees, to such uses as J. C. and A. C. should jointly appoint, and in default of and until such appointment, to the use of J. C. for life, and on his death to the use of A. C. for life, with remainders over.

By indenture made in 1888 A. C. for, valuable consideration, conveyed to J. C. all the estate, interest, and remainder of him the said A. C. expectant on the determination of the life estate of J. C. in the said lands.

Upon the marriage of A. C. in 1890 two settlements were executed—(1) A settlement whereby J. C. granted, and J. C. and A. C., in exercise of the joint

Wylie, J.
1908.

In re
CLELAND'S
ESTATE.

power of appointment vested in them by the settlement of 1866, appointed and confirmed the said lands unto A. C. after the death of J. C., to the use of A. C. for life, or until the happening of certain events—one of which was, if he should, either wholly or partially, assign, charge, or alienate his estate or interest in the premises, except as thereafter mentioned with regard to pin-money; and another of which events was, if he should suffer any judgment-mortgage to be registered so as to affect such estate or interest—and from and after the determination of the said estate upon any of such events during the life of A. C., the said lands were limited upon trust, during the joint lives of A. C. and his wife, to pay the income thereof to his said wife for her separate use; and it was thereby provided that it should be lawful for A. C., after the death of J. C., to charge his life estate with payment to his said wife during their joint lives, by way of pin-money, of an annual sum not exceeding £200, and that no such charge should cause a cesser of the life estate of A. C.; and (2) a settlement whereby the wife's fortune was settled, and under which A. C. covenanted that on the decease of J. C. he would forthwith, by some effectual instrument, secure to his said wife out of his life income from the said lands a yearly annuity of £200 during their joint lives, by way of pin-money.

J. C. died in 1893.

In 1902 A. C. executed a deed whereby he charged, as from the death of J. C., all his life estate in the said lands, and the rents and profits thereof, with payment of the yearly annuity of £200 to his said wife, by way of pin-money, during their joint lives; and by the same deed A. C. admitted that eight years' arrears of said annuity were due at that date, which he thereby covenanted to pay.

In June, 1902, a judgment was recovered in the King's Bench Division in England against A. C., for the sum of £990 debt and £6 19s. costs. The said judgment was subsequently extended to Ireland under the Judgments Extension Act, 1868, and was, in 1903, registered as a judgment mortgage against the interest of A. C. in the said lands. The affidavit of judgment contained no reference to the costs of registering the judgment in Ireland:—

Held, by Wylie, J., (1) that A. C. had still vested in him, under the settlement of 1866, by virtue of the Settled Land Acts, power to sell the said lands, and (2) that the deed of charge of 1902 was not an excessive exercise of the power to charge an annuity by way of pin-money, and did not cause a cesser of the life estate of A. C. under the first-mentioned settlement of 1890; but

Held, by the Court of Appeal (affirming the decision of Wylie, J.), (3) that an English judgment extended to Ireland under the Judgments Extension Act, 1868, can be registered as a judgment mortgage, and that the omission from the affidavit of judgment, made for the purpose of such registration, of the costs of obtaining and registering in Ireland the certificate of the entry of the judgment does not invalidate the registration of the judgment mortgage, and, accordingly, that, on the registration of the judgment mortgage in 1903, the life estate of A. C. under the first-mentioned settlement of 1890 determined.

QUESTIONS of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner, pursuant to section 23 (1) of the Irish Land Act, 1903.

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The material facts set out in the memorandum of the Estates Commissioners, as appearing in the judgment of Wylie, J., were as follows:—

By an indenture of settlement, dated the 22nd October, 1886, John Cleland, father of Arthur Cleland, and said Arthur Cleland, in exercise of the powers therein referred to, granted the “Cleland Estates” unto Edward Cave and Edward Bates, the trustees therein named, their heirs and assigns, to such uses and upon such trusts, and subject to such powers, as the said John Cleland and Arthur Cleland should jointly appoint; and in default of and until such appointment, to the use of the said John Cleland and his assigns for his life, and after his death to the use of the said Arthur Cleland and his assigns for his life, with remainder to the use of the first and other sons of the said Arthur Cleland successively in remainder in tail, with divers remainders over.

By an indenture, dated the 5th June, 1888, the said Arthur Cleland, in consideration of £600, conveyed unto the said John Cleland, his heirs and assigns, all the estate, interest, and remainder of him the said Arthur Cleland expectant on the determination of the life estate of the said John Cleland subsisting by virtue of the said indenture of the 22nd October, 1886.

Upon the marriage of the said Arthur Cleland two material settlements were executed:—

(1) A settlement, dated 9th June, 1890, made between the said John Cleland, of the first part, and the said Arthur Cleland, of the second part, Mabel Sophia Cleland (by her then name of Mabel Sophia d'Aquilar), of the third part, and Sir Augustus Webster and Francis Brodigan of the fourth part, whereby, after reciting (*inter alia*) that “whereas, upon the treaty for the said marriage, it was agreed that the said estate in remainder and interest of him, the said Arthur Cleland, expectant on the determination of the said life estate of the said John Cleland, so conveyed to the said John Cleland in manner aforesaid, . . . should be assured by the said John Cleland to the uses, upon the trusts, and subject to the provisions and restrictions hereinafter

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appearing ; and that the said John Cleland and Arthur Cleland should exercise their joint power of appointment for the purposes of confirming the assurance hereinafter contained of the said life estate in remainder of the said Arthur Cleland, to such uses," &c., the said John Cleland granted and conveyed, and the said John Cleland and Arthur Cleland, in exercise of the joint power of appointment vested in them by the settlement of the 22nd October, 1886, appointed and confirmed the said "Cleland Estates" unto the said Arthur Cleland after the death of the said John Cleland, to the use of the said Arthur Cleland for life, or until the happening of any of the events therein mentioned, one of which was, if he should, either wholly or partially, assign, charge, or alienate his estate or interest in the premises (except as hereinafter mentioned with regard to pin-money), and another of which said events was, if he should suffer any judgment mortgage to be registered so as to affect such estate or interest ; and from and after the determination, upon any of such events, during the life of the said Arthur Cleland, of the estate and interest so limited to him, to the use of the trustees of the said settlement for the residue of the life of the said Arthur Cleland upon trust, during the joint lives of the said Arthur Cleland and his wife Mabel Sophia Cleland, to pay the income to the said Mabel Sophia Cleland for her separate use without power of anticipation ; and after her death, subject to certain discretionary trusts, in trust for John Cleland, his heirs and assigns, during the life of the said Arthur Cleland. And it was by the same indenture provided that it should be lawful for the said Arthur Cleland, after the decease of the said John Cleland, to charge his life estate with the payment, during the joint lives of the said Arthur Cleland and Mabel Sophia Cleland, to the said Mabel Sophia Cleland, by way of pin-money, of any annual sum not exceeding £200, and that no such charge should cause any cesser or forfeiture of the life estate of the said Arthur Cleland under the same indenture.

(2) A settlement, also dated the 9th June, 1890, and made between the said Arthur Cleland, of the first part, his wife, the said Mabel Sophia Cleland (by her then name d'Aquilar), of the second part, Henry T. d'Aquilar, of the third part, the said John Cleland of the fourth part, and trustees, of the fifth part, whereby

the said Mabel Sophia Cleland's fortune was settled. This settlement contained a covenant by the said Arthur Cleland with the said Mabel Sophia d'Aquilar, that in case they should both survive the said John Cleland he, the said Arthur Cleland, would forthwith, after the decease of the said John Cleland, by some effectual and proper deed or instrument, secure out of his life income from the "Cleland Estates" to the said Mabel Sophia d'Aquilar a yearly annuity of at least £200 during the joint lives of himself and the said Mabel Sophia d'Aquilar by way of pin-money, and without power of anticipation, to commence from the decease of the said John Cleland, and to be payable quarterly.

John Cleland died on the 24th October, 1893.

On the 23rd January, 1902, the said Arthur Cleland, purporting to act in pursuance of the said covenant, and in exercise of the power vested in him for that purpose under the said settlement of the 9th June, 1890, executed a deed whereby, after reciting the power to charge, the proviso that such a charge should not cause a cesser of the life estate, the said covenant to charge, the death of John Cleland, that he had not yet executed any formal deed to give effect to the equitable charge, and that his wife had requested him to perform the said covenant, he the said Arthur Cleland did charge, as from the death of the said John Cleland, all his life estate and interest in the "Cleland Estates" under said settlement and the rents and profits thereof with the payment of the yearly annuity of £200 by way of pin-money unto the said Mabel Sophia Cleland during the joint lives of him the said Arthur Cleland and Mabel Sophia Cleland for her separate use without power of anticipation. By said deed of charge the said Arthur Cleland admitted that eight years' arrears of said annuity, amounting to £1600, were due at that date; and by same deed he covenanted to pay the said sum in manner therein mentioned.

On the 24th January, 1902, the said Mabel Sophia Cleland obtained a loan of £1600, and by deed of same date assigned said charge to secure said loan. By this deed Arthur Cleland also secured said loan by his personal covenant and by an assignment of a policy of insurance.

On the 16th June, 1902, a judgment was recovered in the King's Bench Division of the High Court of Justice in England

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against Arthur Cleland for the sum of £990 debt and £6 19s. costs. On the 31st October, 1902, the said judgment was extended to Ireland under the provisions of the Judgments Extension Act, 1868; and the same was, on the 16th April, 1903, registered as a judgment mortgage against the interest of the said Arthur Cleland in the "Cleland Estates." The affidavit of judgment contained no reference to the costs of registering the judgment in Ireland.

In 1905 Arthur Cleland instituted proceedings for the sale of portion of the "Cleland Estates" under the Land Purchase Acts.

The following questions were submitted:—

1. Was the said judgment validly registered as a statutable mortgage against any estate or interest of the said Arthur Cleland in any of the lands and premises? And, if so, did the registration thereof operate to cause a forfeiture of his life estate therein under the provisions of the said first-mentioned indenture of settlement of the 9th day of June, 1890?

2. Did the execution by the said Arthur Cleland of the said indentures of the 23rd and 24th days of January, 1902, or either of them, operate to cause a forfeiture of the life estate of the said Arthur Cleland in the said lands and premises under the said last-mentioned indenture?

3. Was the said Arthur Cleland in receipt of the rents and profits of the said settled lands for a period of at least six years immediately preceding the swearing of the originating application?

4. Has the said Arthur Cleland power, in the events which have happened, to sell the said lands and premises to the occupying tenants thereof under the Irish Land Act, 1903?

Bates, K.C., Oulton, K.C., and James Andrews, for the surviving trustee of the settlement of 1886:—

By the settlement of 1890, the life estate of Arthur Cleland under the settlement of 1886 was extinguished by the exercise of the overriding joint power of appointment. A new life estate was thereby substituted, and the settled lands were limited to new uses during Arthur Cleland's life. His powers as a tenant for life under the former settlement being extinguished, he has no

power to sell as a tenant for life under that settlement. Further, the deed of the 23rd January, 1902, worked a forfeiture of Arthur Cleland's life estate under the settlement of 1890. According to the law relating to pin-money, a wife cannot recover more than one year's arrears, or a year and a portion of a year: *Thrupp v. Harman* (1); *Howard v. Digby* (2). At the time the deed of 1902 was executed, Mrs. Cleland could not have recovered more than that amount on foot of her equitable charge. Under that deed she became entitled to eight years' arrears. The deed, accordingly, created a charge on the life estate in excess of the power to charge given by the settlement of 1890, and caused a cesser of the life estate.

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Serjeant O'Connor, K.C., and *Redmond Carroll*, for the trustees of the settlement of 1890 :—

The life estate of Arthur Cleland, under the settlement of 1886, was not extinguished by the settlement of 1890. That settlement was in reality a resettlement of the original life estate created by the former settlement—in fact, a splitting up of that life estate between Arthur Cleland and his wife. The joint power of appointment given by the former settlement was only exercised to confirm the old life estate, with the powers annexed thereto, to the uses of the re-settlement. Accordingly, by virtue of sect. 50 of the Settled Land Act, 1882, Arthur Cleland is still entitled to exercise the powers of a tenant for life under the settlement of 1886 (3).

Matheson, K.C., *Garrett Walker, K.C.*, and *Brunskill*, for Arthur Cleland and Mrs. Cleland :—

The object of the settlement of 1890 was to keep alive the life estate of Arthur Cleland under the settlement of 1886. The recital of the agreement in the settlement of 1890 shows clearly what was intended by it, namely, that John Cleland as owner of an estate *pur autre vie*, vested in him as assignee of Arthur

(1) 3 M. & K. 513.

(2) 2 Cl. & F. 634.

(3) The arguments as to the validity of the registration of the judgment mortgage against the life estate of Arthur Cleland will be found fully reported in the Court of Appeal, *post*, p. 19.

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Cleland under the assignment of 1888, should convey and assure that estate to the uses of the re-settlement, and that the joint power of appointment should be exercised for the purpose of confirming that assurance. That was what was, in effect, carried out by the settlement of 1890. The power of sale vested in Arthur Cleland under the settlement of 1886 did not pass to his assignee (section 50 of the Settled Land Act, 1882), and can still be exercised by him.

With regard to the next point, the deed of 1902 was not in excess of the power to charge. Under the covenant by Arthur Cleland in the second settlement of 1890, Mrs. Cleland became entitled to an equitable charge of £200 a year, by way of pin-money, as from the 24th October, 1893. All the deed of the 23rd January, 1902, did was to charge what Arthur Cleland had covenanted to charge, and no more. Accordingly, it could not work a forfeiture of his life estate. If it did, the result would have been that Mrs. Cleland, instead of getting a charge of £200 a year, would have become entitled to the entire rents and profits of the lands.

March 16.

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On the 22nd September, 1905, Arthur Cleland lodged with the Estates Commissioners an originating application for the purpose of carrying out a sale by him to the tenants thereof, of a portion of the "Cleland estates." In December, 1906, Edward Bates, as sole surviving trustee of the settlement of said estates, dated the 22nd October, 1886, served notice of an application to the Estates Commissioners to set aside said originating application and all proceedings thereunder, on the ground that the said Arthur Cleland had no power to sell the said estates or any part thereof, and had not been for six years preceding the originating application in receipt of the rents and profits thereof. That application would have raised a number of difficult questions of law; and, accordingly, with the assent of all parties interested, the Estates Commissioners have submitted those questions to me by a memorandum setting forth the facts and documents on which they arise. The memorandum contains a good deal of irrelevant matter; but so far as material the facts as set out are as follows :—
[His Lordship stated the facts above set out.]

Now, as to the third question, I can dispose of it at once by saying that it is a pure question of fact, and, therefore, outside my jurisdiction, which, under section 23, is limited to questions of law; but, if Arthur Cleland has otherwise power to sell, the question is not material.

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On reading the other three questions it would seem as if the first and second questions were only asked as leading up to the fourth. But, on referring to the last paragraph of the memorandum, it is evident that question 4 has a double aspect—First, has Arthur Cleland a power to sell as tenant for life under the settlement of 1886? Second, has he power to sell as tenant for life under the settlement of 1890? These, however, are inconsistent alternatives, because, I think, it will clearly appear that if he still has power to sell under the earlier settlement, he cannot have such power under the later one. The proper course, therefore, will be first to consider and decide the question whether Arthur Cleland has power to sell under the settlement of 1886.

Now, under that settlement, Arthur Cleland was beneficially entitled to the settled estates for his own life in remainder after the life estate of his father, John Cleland, and on his estate falling into possession would, under the Settled Land Acts, have power to sell the settled lands. By the deed of 1888, Arthur Cleland assigned for value his said life estate in remainder to John Cleland, his heirs, and assigns. But, by section 50 of the Settled Land Act, 1882, his power of sale, being incapable of assignment or release, did not pass to the assignee, and remained exercisable by him notwithstanding the assignment, with this limitation only, that he could not exercise it so as to affect the rights of the assignee without his consent. It could not, however, be exercised by him until his estate in remainder fell into possession by the death of his father, and could perhaps only be exercised so long as his life estate continued to subsist under the settlement, though on this latter point I do not wish to express any opinion. Now, there was in the settlement a power of appointment, vested in John Cleland and Arthur Cleland jointly, overriding the life estates created by the settlement; and by the exercise of that joint power all the uses of the settlement might have been revoked, and the lands limited to new uses. It has,

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accordingly, been contended on behalf of the trustee of the settlement of 1886 that, by the settlement of the 9th June, 1890, the life estate of Arthur Cleland under the settlement of 1886 was extinguished by the exercise of the overriding joint power of appointment, and that the settled lands were thereby limited to new uses during Arthur Cleland's life. On the other hand, it is contended that the life estate of Arthur Cleland, under the first settlement, was not extinguished by the later settlement, but, on the contrary, was conveyed and assured to trustees by way of resettlement during his life, and that the joint power was only exercised to confirm the old life estate, with the powers of charging jointure and portions and other powers annexed thereto, to the uses of the resettlement.

By virtue of the settlement of 1886 and the deed of assignment of 1888, John Cleland was, at the date of the resettlement of the 9th June 1890, not only entitled to the estates as tenant for his own life in possession, but was also entitled to the life estate in remainder of Arthur Cleland, and by that resettlement, without in any way dealing with his own life estate, or the estates in remainder after the life estate of Arthur Cleland subsisting under the settlement of 1886, John Cleland settled Arthur's life estate in remainder as a subsisting and continuing life estate under the settlement of 1886. That that was the sole object and effect of the settlement of 1890 is made, I think, abundantly clear by reading the recitals in connexion with the operative part of the deed. That settlement, after reciting the earlier title to the "Cleland estates," recited the settlement of 1886, and the assignment by Arthur Cleland of his life estate in remainder under said settlement to John Cleland, and then, after reciting the intended marriage of Arthur Cleland, contained the following recital—"Whereas, upon the treaty for said marriage, it was agreed that the said estate in remainder and interest of him the said Arthur Cleland expectant on the determination of the said life estate of said John Cleland so conveyed to the said John Cleland in manner aforesaid . . . should be assured by the said John Cleland to the uses, upon the trusts, and subject to the conditions and provisions and restrictions hereinafter appearing; and that the said John Cleland and Arthur Cleland should exercise their

joint power of appointment for the purpose of confirming the assurance hereinafter contained of the said life estate in remainder of the said Arthur Cleland to such uses," &c. Can there be any doubt as to the meaning of that recital? Is it not clear beyond question that the agreement there recited was, that John Cleland, as the owner of an estate *pur autre vie*, should convey and assure that estate to the uses of that settlement, and that the joint power should be exercised for confirming that assurance? Then, in pursuance of that agreement, John Cleland grants and conveys, and he and Arthur Cleland appoint and confirm unto Arthur Cleland the settled lands to hold from the death of the said John Cleland for the life of the said Arthur Cleland, subject as therein mentioned, and together with, and as annexed to the life estate thereby limited to Arthur Cleland, the same powers of charging jointure and portions, &c., as were annexed to the life estate limited to said Arthur Cleland by the deed of 1886, to the use of the said Arthur Cleland for his life, or until the happening of (amongst others) either of the two events already mentioned, the ultimate limitation being to John Cleland, his heirs and assigns. That, it seems to me, is a complete settlement of the estate *pur autre vie* vested in John Cleland as assignee of Arthur and of nothing else; and all the parties claiming under that settlement claim under John Cleland as assignee and, as, under section 50 of the Settled Land Act of 1882, the power of sale vested in Arthur Cleland, as tenant for life under the settlement of 1886, could not pass to John Cleland as his assignee, it could not pass to any person claiming under John. I think the position of Arthur Cleland after the settlement of 1890, with reference to his power of sale under the settlement of 1886, was exactly the same as it would have been if John Cleland, instead of settling his said estate *pur autre vie* upon Arthur Cleland, his wife and family, had conveyed it to a stranger. In my opinion, therefore, notwithstanding the assignment of 1888 and the settlement of 1890, Arthur Cleland has still vested in him under the settlement of 1886, by virtue of the Settled Land Acts, power to sell the settled lands; but, as he assigned his life estate for value, he can only exercise that power with the consent of the persons now entitled to that estate.

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Having decided that question in the affirmative, the other questions, so far as they relate to Arthur Cleland's power to sell, become immaterial; but as those questions were fully argued at great expense, and as the answers to them will determine another question which will shortly arise in the course of these proceedings, viz., Who is entitled to receive the interest in lieu of rent and interest on the purchase-money when advanced? I understand that all parties interested have agreed that I should decide these questions now.

The first question is, whether the deed of charge executed by Arthur Cleland on the 23rd January, 1902, caused a cesser of his life estate under the settlement of 1890.

Now, that settlement empowered Arthur Cleland to charge the settled lands, after the death of his father, which took place on the 24th October, 1893, with an annuity of £200 for his wife by way of pin-money during their joint lives, and provided that such a charge should not cause a cesser of his life estate. And, by the wife's settlement of same date, Arthur Cleland covenanted with his then intended wife that, in case they both survived his father, he would forthwith, after his father's death, charge the lands in manner aforesaid.

Now, it was admitted by all parties that, by virtue of that covenant, Arthur Cleland's wife, immediately on the death of his father, became entitled to an equitable charge of £200 a year by way of pin-money commencing from the 24th October, 1893, and, therefore, on the 24th October, 1901, if nothing had been paid in the meantime on foot of the annuity, Mrs Cleland had, apart from the peculiarity of the law relating to pin-money, an equitable charge for eight years' arrears, or £1600. Accordingly, by the deed of the 23rd January, 1902, after reciting the aforesaid power to charge, the proviso that such a charge should not cause a cesser of the life estate, the covenant to charge above-mentioned, the death of John Cleland, and that Arthur Cleland had not yet executed any formal deed to give effect to said equitable charge, that there was then due, as Arthur Cleland thereby admitted, eight years' arrears amounting to £1600 secured by said equitable charge, and that his wife requested the said Arthur Cleland to perform the said covenant, it was witnessed that in pursuance of

said covenant and in exercise of said power and of every other power in that behalf enabling, the said Arthur Cleland did thereby charge as from the 24th October, 1893, his life estate and interest in said lands, and the rents and profits thereof, with a yearly annuity of £200 by way of pin-money in favour of his wife, during their joint lives, for her separate use without power of anticipation.

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Now it is contended that this deed created a charge on the life estate in excess of the power to charge, and, therefore, caused a cesser of the life estate. If it did, this curious result would follow, that the wife, who was a party to the deed, and required it to be executed, would, instead of getting £200 a year, charged on the lands, become, under the settlement, entitled to the entire rents and profits.

The ground of the above contention is this. It is alleged that, according to the law regarding pin-money, a wife cannot recover more than one year's arrears, or a year and a portion of a year, and that, therefore, at the date of the deed of charge, she could not have recovered more on foot of her equitable charge; and that the deed of charge, by giving her eight years' arrears, exceeded the power.

Now, from the view I take of the deed of charge, I am not called upon to decide, nor have I materials to decide, how much Mrs. Cleland could have recovered in 1902 on foot of her equitable charge under the deed of 1890. I think the deed of charge on its face clearly shows that it was not intended to give the wife more than she was then entitled to under her existing equitable charge. It is plain from the recitals that the draftsman, when settling the deed, had two things present to his mind—(1) the limits of the power to charge, and (2) the fact that, if the deed exceeded those limits, it would not only cause a forfeiture of the life estate, but would also cause the lands to pass to the person in whose favour the charge was being made. The operative part of the deed seems to me to have been carefully framed so as to carry out the above intention as shown by the recitals; and, in my opinion, it had no greater effect, and, therefore, did not cause a forfeiture.

The remaining question is, Was the judgment mortgage of 16th April, 1903, a valid judgment mortgage?

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There are many objections to the validity of the judgment mortgage set forth in the memorandum, but only two were really pressed in argument—(1) That an English judgment, even when registered in Ireland under the Judgments Extension Act, cannot be registered as a judgment mortgage; and (2) that the omission from the affidavit of judgment of the sum of £3 5s., mentioned in the certificate of the registry of the judgment, invalidated the registration of the judgment mortgage.

The validity of the first objection depends upon the construction of the Judgments Extension Act, 1868.

Prior to that Act an English judgment could not be enforced against the debtor's property in Ireland by any process or mode of execution; and in order to realize his debt out of the debtor's Irish property, the creditor was obliged to incur the cost and trouble of an action in Ireland grounded on the English judgment. To remedy this defect in the law the Judgments Extension Act was passed. Section 1 of the Act provides in substance that a certificate of an English judgment may be registered in the Court of Common Pleas at Dublin, and when registered shall have the same force and effect, and all proceedings may be had and taken thereon, as if the judgment of which it is a certificate had been a judgment obtained in the Court in which it is registered; and sect. 6 provides that, in any action brought in Ireland on any judgment that might be registered in Ireland under the Act, the plaintiff shall recover no costs or expenses of suit unless otherwise ordered.

If those two sections stood alone, I think the object and effect of the Act would be too clear for argument.

In *Thompson v. Gill* (1) Vaughan Williams, L.J., says:—
“Having regard to the provisions of sect. 6, it seems to me clear that the intention of the Act was to place a judgment creditor who had registered his judgment under the Act in the same position as if he had brought an action on the judgment, and obtained judgment in that action.” If such be the effect of the Act, the right of the creditor in such a case to register his judgment as a mortgage would follow as a matter of course. But sect. 4 of the Act provides that the Court of Common Pleas at

(1) [1903] 1 K. B. at p. 767.

Dublin shall have and exercise the same control and jurisdiction over any judgment, and over any certificate of such judgment registered under the Act, as it now has or exercises over any judgment of its own Court, "but in so far only as relates to execution under this Act." And it has been decided in several cases that those concluding words, "but in so far only as relates to execution under this Act," limit the generality of the provisions of sect. 1, and prevent the Act from applying to any proceeding upon the judgment which is not execution, or does not relate to execution. And it is contended in this case that the registration of a judgment as a mortgage is not execution, and does not relate to execution.

I have not been referred to any direct authority on this point, nor have I found any. It was discussed in *In re Cox's Estate* (1) before Mr. Justice Ross; but no decision or opinion was given upon it.

In *In re Lambe's Estate* (2), and other cases, the registration of a judgment as a mortgage was held not to be "process" within the meaning of a protection order in bankruptcy, "process" there meaning a writ of execution.

In *Barnett v. Bradley* (3) it was held not to be "execution" within the meaning of the words "stay of execution" on a judgment. In that case FitzGibbon, L.J., at p. 215, says:—"Having regard to the authorities I hold that the registration of this judgment as a mortgage was not 'execution' within the meaning of the stay, though there are senses in which such a registration may be regarded as an execution."

In *Johnston v. Watson* (4) it was held that the procedure by judgment summons under the Debtors Act, 1869, was not "execution" within the meaning of sect. 4 of the Judgments Extension Act, such a proceeding being in its nature punitive, and not a mere mode of enforcing payment of the debt.

In *Johnstone v. Bucknall* (5), Gibson, J., held that execution in sect. 4 was not restricted to writs of execution, but extended to such a remedy as a garnishee order, which was a well-known

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(1) [1900] 1 I. R. 269.

(2) I. R. 3 Eq. 236.

(3) 26 L. R. Ir. 209.

(4) [1893] 1 Q. B. 21.

(5) [1898] 2 I. R. 501.

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In *Thompson v. Gill* (1), already referred to, the Court of Appeal in England held that the appointment of a receiver by way of equitable execution was "execution" within sect. 4.

The above are the principal authorities bearing upon the construction of the Act of 1868, but none of them covers the point raised in this case.

Reading sections 1, 4, and 6 of the Act together, it seems to me that the Act intended to give an English judgment creditor, whose judgment was registered in Ireland under the Act, the same remedies for realizing his judgment debt out of the debtor's property in Ireland as if his judgment were a judgment recovered in Ireland, so as to do away with the necessity of bringing in Ireland an action on the English judgment. I do not think any of the authorities are inconsistent with this view. And it seems to me that, though the registration of a judgment as a mortgage is not "execution" in the strict sense of the word, it may be said to relate to execution in the wider sense, as a step towards execution or the realization of the debt out of the property of the debtor. The procedure by judgment mortgage was, at the date of the Act of 1868, the only remedy of a creditor under a judgment entered up after the 15th July, 1850, against the freehold or equitable leasehold lands of the judgment debtor; and what a strange result would follow, if it were held that section 4 excluded from the operation of the Act the only remedy available, at the time of its passing, for realizing an Irish judgment debt out of the debtor's principal Irish property? It seems to me that sect. 4 was intended to limit the control and jurisdiction of the Irish Court over an English judgment when registered in Ireland, not with a view to excluding from the operation of the Act any of the remedies then available for realizing a judgment debt out of the debtor's property, but with a view to preventing the Irish Court, and, of course, in the same way, the English or Scotch Courts, from entertaining any question, as to validity or otherwise, affecting the judgment or decree of which a certificate was registered under the Act.

It was also contended, and I am disposed to think rightly, that the creditor, in registering his judgment as a mortgage, makes no application to the Court to exercise any control or jurisdiction over the judgment, and that, as far as that step is concerned, the limitations provided in section 4 do not apply, and any subsequent steps that the creditor may take to realize his judgment mortgage do not depend upon the Judgments Extension Act, but upon the Judgment Mortgage Act, which puts the creditor in the same position as if he had obtained from his debtor a mortgage by deed.

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In my opinion, therefore, an English judgment, when registered in Ireland, may be registered as a judgment mortgage.

But even assuming this, the second objection is raised that the omission from the affidavit of judgment of the sum of £3 5s., the costs of registering the judgment in Ireland, invalidates the registration of the judgment mortgage.

This objection turns upon the construction of the provision as to the costs of registering the certificate contained in section 1 of the Judgments Extension Act, and of the provisions of section 6 of the Judgment Mortgage Act. This latter section requires the affidavit of judgment to state the "amount of debt, damages, costs, or moneys, recovered or ordered to be paid by such judgment."

Now, it is laid down in a book of authority on this question—Madden on Registration, at p. 143—that "the word 'costs' in this section applies to those cases in which a specific sum is obtained by the judgment for costs as such. It does not apply to a sum added, after taxation, to the sum recovered by the judgment. . . . In such a case the total omission of costs from the affidavit will not vitiate the registry"; and again, at page 145—"Where a judgment is recovered for two distinct sums, one for debt and the other for costs, the omission of the latter is fatal, even though it be a nominal sum."

The validity of the objection, therefore, turns on the question whether the sum of £3 5s., in this case, is "costs recovered or ordered to be paid by the judgment." Sect. 1 of the Judgments Extension Act provides that a certificate of an English judgment may be registered in Dublin, and when registered shall be of the

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same force and effect as if the judgment of which it is a certificate had been a judgment originally obtained in the Court in which it is so registered, and all the reasonable costs of registering such certificate shall be recovered in like manner as if the same were part of the original judgment. Now, the English judgment in this case was for £990 debt, and £6 19s. costs; and the certificate, according to the form prescribed by the Act, certifies that the judgment was for the payment of £990 debt and £6 19s. for costs. Therefore, if the judgment of which that is a certificate had been originally obtained in Ireland, it would be a judgment for £990 debt and £6 19s. costs only. And though the statute gives the creditor a right to recover the costs of registration in like manner as if the same were part of the judgment, it does not make them costs recovered or ordered to be paid by the judgment; and the Judgment Mortgage Act does not require them to be stated in the affidavit.

This objection, therefore, in my opinion, also fails; and I must hold that Arthur Cleland suffered a valid judgment mortgage to be registered so as to affect his estate in the settled lands under the settlement of 1890, and that his life interest therein thereupon determined, and the rents and profits from that time became payable to the trustees for the use of Mrs. Cleland, so that the order at present in force for the payment of interest in lieu of rent is right.

My answers to the questions submitted to me will be as follows:—I answer both parts of question 1 in the affirmative. My answer to question 2 is “No.” I decline to answer question 3, on the ground that it is a question of fact. My answer to question 4 is, “Yes, as tenant for life under the deed of 1886.”

J. E. W.

Arthur Charles Stewart Cleland appealed against as much of the order of Mr. Justice Wylie as declared the judgment mortgage of 16th April, 1903, to be valid (1).

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Matheson, K.C., Garrett Walker, K.C., and Brunskill, for the appellant:—

1. An English judgment which has been extended by registration to this country cannot be subsequently registered as a valid judgment mortgage. No doubt, if section 1 of the Judgments Extension Act, 1868, stood by itself, the judgment here in question would have had the same force and effect in all respects as if originally recovered in Ireland; but by sect. 4 of the Act the Irish Courts can exercise control over such a judgment "in so far only as relates to execution" under the Act. In *In re Watson* (2) Lord Esher laid down that sect. 4 of the Act "limits the whole of section 1, and shows that the general words of that section are not to be read in their largest sense." It was there decided that the English Court had no jurisdiction to issue a judgment summons for the purpose of enforcing an Irish judgment registered in England, such procedure not being "execution" within section 4. So in *In re a Bankruptcy Notice* (3) it was held that a registered judgment could not be made the foundation of a bankruptcy notice, the effect of the Judgment Extension Act being limited to execution. The registration of a judgment as a mortgage is not "execution": *Flueter v. M'Clelland* (4); *In re Lamb's Estate* (5); *Rooney's Estate* (6); *Barnett v. Bradley* (7). Accordingly an English judgment, though extended to this country, cannot be registered as a judgment mortgage; such a judgment is not included amongst those mentioned in sect. 6 of 13 & 14 Vict. c. 29, which alone can be registered as mortgages. [They also referred to *Thompson v. Gill* (8) and *Johnstone v. Bucknall* (9).]

2. The omission of the costs of extending the judgment in the

(1) In the Court of Appeal, before
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GIBBON and HOLMES, L.JJ.

(2) [1893] 1 Q. B. 21.

(3) [1898] 1 Q. B. 383.

(4) 8 C. B. (N. S.) 357.

(5) 1 R. 3 Eq. 286.

(6) 8 I. L. T. R. 125.

(7) 26 L. R. Ir. 209.

(8) [1903] 1 K. B. 760.

(9) [1898] 2 I. R. 499.

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affidavit to register as a mortgage is fatal to the validity of the judgment mortgage. By sect. 1 of the Judgments Extension Act, 1868, such costs are to be recovered in like manner as if part of the original judgment, and as such should, under sect. 6 of 13 & 14 Vict. c. 29, have been included in the affidavit to register as a mortgage. The judgment creditor could, no doubt, have waived his costs: *In re Flood* (1); but he did not do so, and the costs having been included, they should have been correctly stated: *Pilson's Estate* (2); *Grispi's Estate* (3); *M'Craith v. Quin* (4).

Serjeant O'Connor, K.C., and Redmond Carroll, for the respondents:—

The only effect of sect. 4 of the Judgments Extension Act, 1868, is to restrict the control of the Court over an extended judgment to matter of execution, that is, the Court cannot determine upon the validity or invalidity of the judgment, but takes it over as it is, and issues execution upon it. We contend, however, that the registration of a judgment as a mortgage under sect. 6 of 13 & 14 Vict. c. 29, is not an act of the Court; the judgment creditor did not seek to put the Court in motion, as in *In re Watson* (5), and *In re a Bankruptcy Notice* (6), but filed the necessary affidavit as an independent act of his own, and this he was entitled to do under the general words of sect. 1 of the Judgments Extension Act. If the registration of the judgment as a mortgage is to be regarded as an act of the Court, then we say that such registration is execution in the wider sense of the word referred to by Fitz Gibbon, L.J., in *Barnett v. Bradley* (7). That "execution" in sect. 4 is not limited to writs of execution is shown by *Johnstone v. Bucknall* (8), where Gibson, J., held that "execution" in this section extended to such a remedy as a garnishee order. If the appellant's contention, which is contrary to the practice established for many years, be right, it will follow that a creditor who has obtained an English judgment and extended it to this country will have no remedy against the freehold lands of the judgment

(1) 17 Ir. Ch. R. 130.

(2) 7 I. J. (N. S.) 68.

(3) *Ibid.* 119.

(4) I. R. 7 Eq. 324, 328.

(5) [1893] 1 Q. B. 21.

(6) [1898] 1 Q. B. 383.

(7) 26 L. R. Ir. 209.

(8) [1898] 2 I. R. 499.

debtor in Ireland, save by bringing a fresh action on his judgment, and subsequently registering the judgment in the second action as a mortgage against the lands.

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As to the second point, it is clear that the judgment creditor, if entitled to waive all his acts, was entitled to waive those incurred in respect of the extension of the judgment.

THE LORD CHANCELLOR :—

Nov. 16.

This is an appeal from portion of an order of Mr. Justice Wylie.

The only question which we have to decide is, whether a certain judgment obtained in England against Arthur Charles Stewart Cleland, and registered in Ireland under the provisions of the Judgments Extension Act, 1868, was validly registered as a statutable mortgage against his estate. If it was, it is conceded that the registration caused a forfeiture of his estate within the meaning of the provisions of the settlement of the 9th June, 1890. The English judgment was recovered on the 16th June, 1902, for the sum of £990 debt and £6 19s. costs, and it was registered in Ireland on the 31st October, 1902, and on the 16th April, 1903, the plaintiff made an affidavit under the provisions of the Judgment Mortgage Act, 1850, for the purpose of registering the judgment as a mortgage against Cleland's lands, and deposited an office copy of the affidavit in the Registry of Deeds Office. In this affidavit he stated accurately the amount of the debt and costs recovered by the judgment.

There were costs of registering in Ireland amounting to £3 5s. which are recoverable under the Judgments Extension Act; but he did not state this sum of £3 5s. in the affidavits for registry.

Two questions were argued—(1) It was said that the English judgment could not, after the registry in Ireland, be registered as a mortgage at all, having regard to the provisions of the Judgments Extension Act and the decisions upon it; (2) that the registration was invalid because the affidavit of registry omitted the £3 5s. costs.

The first of these questions is a very important one, and, if decided in favour of the appellant's contention, would have a far-reaching effect, inasmuch as the Act is in force for forty years,

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and I have no doubt has been largely availed of by judgment creditors for registering judgments against Irish land, and I have also no doubt that many payments out of the sale of lands on foot of such registered mortgages have been made. The question has been argued on the construction of sections 1, 4, and 6 of the Act of 1868. It is admitted that if the 1st section of the Act stood alone, the question would be too plain for argument. That section, after providing for the registry of the certificate, says—"and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered."

But then the 4th section says [His Lordship read the section and continued]. That 4th section, it is argued, limits the operation of the certificate to execution, and that in the case now before the Court there is no execution within those words. It is true that in *Re Watson* (1) the Court of Appeal held that a judgment summons under the Debtors Act, 1869, could not be founded on the registered judgment, as this was not execution of the judgment debt within the meaning of sect. 4. Having regard to the nature of the punitive proceeding by judgment summons, I think the decision, if I may say so, is perfectly right.

So, in the case reported as *A Bankruptcy Notice* (2) it was held that a bankruptcy notice could not be founded on a decret of the Court of Session in Scotland registered in England, as a bankruptcy notice was not an execution, and that therefore the power was not given by the Judgments Extension Act. The Judges considered the point concluded by the decision in *Re Watson* (1).

In my opinion, neither of those authorities governs the present case.

It is very material to consider what remedies a judgment creditor had against the freehold lands of his debtor at the date of the passing of the Judgments Extension Act of 1868. They are, as to judgments recovered after 1850, contained in the Judgment Mortgage Act, 1850. That Act recites the previous

(1) [1893] 1 Q. B. 21.

(2) [1898] 1 Q. B. 383.

law in 5 & 6 Wm. 4, c. 55, and Pigot's Act, under which a writ of elegit could be obtained against all the lands of the debtor; and a charge was created over the lands in the same manner as if the judgment debtor had power to charge them, and had by writing agreed to charge them, and a right to get a receiver was given. The Act then recites that it was expedient to amend the law, and enacts that the Act of Wm. 4 and Pigot's Act shall not be applicable to any future judgment, and that no writ of elegit or writ of execution shall be issued upon such judgment, and that no lands or hereditaments shall be charged by any such judgment save as provided by the Act.

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The Act then in the 6th section provides, as regards future judgments, or judgments obtained in an Inferior Court and removed to a Superior Court, when the judgment creditor knows or believes that his debtor has lands which by virtue of the Act are exempted from being taken under any writ of execution to be issued upon any such judgment, he may make and file an affidavit in the Court in which the judgment was, and register that in the office for registering deeds. The statutory effect of this registration is, according to the 7th section, to vest in the creditor all the lands mentioned in the affidavit for all the estate of the debtor, as if he had executed a conveyance thereof to the creditor subject to redemption. This is the right which is given in substitution for the former execution by elegit and charge under Pigot's Act; and it is the remedy against the lands which the judgment creditor is given for realizing his debt out of them.

In my opinion the language of section 4 is large enough to include this substituted mode of realization.

In *Johnstone v. Bucknall* (1) Mr. Justice Gibson decided, and I think rightly, that a garnishee order could be made on foot of a judgment obtained in England and extended to Ireland under the Judgments Extension Act. He discusses *Re Watson* (2) and *The Bankruptcy Notice Case* (3), and concludes—"I am of opinion that execution in sect. 4 is not restricted to writs of execution, but extends to such a remedy as a garnishee order, which was a well-known and direct means of enforcing a judgment at the time the Act of 1868 was passed."

(1) [1898] 2 I. R. 499. (2) [1893] 1 Q. B. 21. (3) [1898] 1 Q. B. 383.

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The view of Mr. Justice Gibson was, I think, applied and extended in the case of *Thompson v. Gill* (1). There a decret had been obtained in Scotland in the Court of Session which was registered in England. The question was whether the judgment creditor was entitled to obtain a receiver by way of equitable execution over certain trust property of the debtor. *Watson's Case* (2) and *The Bankruptcy Notice Case* (3) were relied upon, but the Court of Appeal held that there was nothing in either of these cases which prevented the giving to the words "in so far only as relates to execution" in section 4 a construction wide enough to enable a reasonable effect being given to the provisions of the Act. Lord Justice Vaughan Williams defines that as "what would be said in popular language to amount to obtaining execution by making the property of the judgment debtor available for satisfaction of the judgment debt." That was the scope and object of the Judgment Mortgage Act of 1850. Lord Justice Stirling takes the same view.

I may here mention sect. 6 of the Extension of Judgments Act. It enacts [His Lordship read the section]. Upon that section Lord Justice Vaughan Williams says in *Thompson v. Gill* (1): "Having regard to the provisions of sect. 6 of the Act, which provides that costs are not to be allowed to any party bringing an action on any judgment or decret which might be registered under the Act, unless the Court or Judge shall otherwise order, it seems to me clear that the intention of the Act was to place a judgment creditor who had registered his judgment under the Act in the same position as if he had brought an action upon the judgment in England, and obtained judgment in that action." Read "Ireland" for "England," and every word of that applies.

Lord Justice Stirling says, as to that section 6, "The intention appears to have been to discourage the bringing of actions on such judgments, and to substitute for that mode of procedure a shorter and more convenient mode of obtaining the same result."

Mr. Justice Wylie refers to another reason for his decision, viz., that there was no application made to the Court, or necessary to be made. I recognize the force of that. At the same time, it

(1) [1903] 1 K. B. 760. (2) [1893] 1 Q. B. 21. (3) [1898] 1 Q. B. 383.

hardly meets *The Bankruptcy Notice Case* (1). I think the words of section 4 are large enough to embrace the remedy known to the law in 1868 of obtaining realization of the debt out of the freehold property of the debtor by the proceeding created by the Act of 1850.

As to the other point, viz., the omission to state the £3 5s. in the affidavit, I think if it had been inserted a formidable difficulty might have been created as against the validity of the registration. The £3 5s. was not recovered by the judgment at all. It was recoverable by the provisions of the Judgments Extension Act, but it was not part of the judgment.

I think the decision of Mr. Justice Wylie was entirely right.

FITZGIBBON, L.J. :—

I decide this case, and I affirm the decision of Wylie, J., upon the construction of the “Judgments Extension Act, 1868,” sections 1 and 4, as applied to the “Judgment Mortgage Act, 1850,” and a contrary decision would not only be, in my opinion, contrary to the express words of the Act of 1868, but it would also, to my own knowledge, declare the procedure in Ireland upon English judgments for the last forty years to have been erroneous, and it would invalidate countless transactions involving vast sums of money during that period as having been illegal in so far as they purported to charge English judgments, when extended, upon Irish land, and resulted in the payment of such judgments as incumbrances out of the rents, profits, and purchase-money of lands against which they had been registered under the Extension Act.

During the past thirty years I have not infrequently sat in the Landed Estates and Land Judge's Courts for every Judge from Ormsby, J., to Ross, J. I have ruled many schedules of incumbrances, and ordered the payment of many judgment mortgages, and the opening of this appeal was the first occasion upon which I ever heard even a suggestion that there was any distinction between the effect, as an incumbrance, of an original Irish

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(1) [1898] 1 Q. B. 383.

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Mortgages" under the Act of 1850.

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The Act of 1868 is entitled "An Act to render judgments obtained in certain Courts in England, Scotland, and Ireland, respectively, *effectual* in any other part of the United Kingdom." Section 1 deals with all three countries in the same sentence and in the same terms. "Where judgment is obtained at Westminster for any debt damages or costs, on production to the Master of the Common Pleas at Dublin of a certificate of such judgment purporting to be signed by the proper officer of the Court where such judgment has been obtained, such certificate shall be registered by such Master in the Register for English Judgments," and "shall from the date of such registration *be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained on the date of such registration in the Court in which it is so registered.*"

Being bound to treat the registered certificate as having the same effect as if the English judgment had been an original judgment of the Irish Court of Common Pleas, we must go to the Judgment Mortgage Act to find what that effect is, and to find what proceedings may be taken upon the Irish original judgment of which the English registered certificate is the equivalent. It seems to me to be perfectly clear that the proceedings must include the proceedings necessary to make the judgment available against the debtor's lands.

The procedure by which a judgment for debt could be charged upon and levied out of lands has varied from time to time. The Act of 1850 recites 5 & 6 Wm. 4, c. 55, under which any person entitled to sue out a writ of *elegit* could apply to Chancery for a receiver over the lands which he would be entitled to have extended under an "*Elegit, levare facias*, or other proceeding"; it also recites 3 & 4 Vict. c. 105 and 7 & 8 Vict. c. 90, altering and extending the procedure for obtaining payment of judgment debts out of lands, and as to all judgments obtained after its passing, it substitutes for the previous procedure the registration of an affidavit of the judgment, with the same effect as if the

debtor had executed a mortgage by deed of the lands at the date of the registration.

I find it impossible upon this legislation to doubt that obtaining a judgment mortgage under that Act is a proceeding which may be had and taken on a certificate of an English judgment when registered under the Extension Act, it being one which might be taken on a judgment originally obtained in the Irish Court of Common Pleas. Nor can I doubt that the "effect" of charging the lands by a judgment mortgage, is part of "the same effect" which an original Irish judgment would have had when registered by taking the proper "proceeding" under the Act of 1850. This proceeding must, up to a certain point, "be taken by the party," and up to that point the "control and jurisdiction" of the Court of Common Pleas would not come in. It might be brought in to levy the judgment, and if so, sect. 4 would come in to give that Court control and jurisdiction over the "execution" of the registered judgment. But otherwise sect. 4 does not appear to me to apply at all to the proceeding for obtaining or enforcing the judgment mortgage. It cannot deprive the party of his power to take the proceedings necessary to give "the same effect" to his registered judgment as if it were an original judgment. Even if it applies, it seems to me that levying the judgment by means of the judgment mortgage, which was substituted for *elegit*, or *levari facias*, as well as for a receiver, might well be described as "execution." But however that may be, the validity of the judgment mortgage, which has the same effect as a mortgage deed, can not be affected by sect. 4, which deals only with the control and jurisdiction of the Court of Common Pleas, and has nothing to do with the procedure for enforcing payment of the supposed mortgage by deed, which under the Act of 1850, sect. 7, is the measure of "the rights, powers, and remedies" of the registered judgment creditor. The appellant's counsel were driven to contend that an English judgment can, since 1868, be made a charge on Irish land only by first bringing an action and obtaining an Irish judgment upon it, and then by registering that Irish judgment under the Act of 1850. This would be a strange construction of an Act which expressly provides that the registered certificate shall have "the same force and effect" as an original

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Irish judgment, and that all the same proceedings may be taken upon it. That such circuitry was contrary to the intention of the Legislature is demonstrated by sect. 6, which penalizes any person who brings an action on an English judgment by depriving him of the costs, unless he obtains an order from the Irish Court entitling him to them. The English Court of Appeal has held this section to indicate the intention that an English judgment-holder shall be in the same position as if he had brought an action upon it. But it would follow from the appellant's argument that every creditor who has registered an English or Scotch judgment in Ireland since 1868, has not only got no valid security, but has omitted to bring an action upon his judgment, and to obtain an order entitling him to his costs, as the only legal means of making his "foreign" judgment recoverable out of the lands of his debtor.

On the second point which Mr. Matheson left to Mr. Walker, namely, that the registration was bad because it omitted the costs of registration from the amount stated to have been recovered by the English judgment, we have ascertained from the Master that no rules as to the costs of registration have been made in Ireland; it has been the practice since the Act passed to name a sum of £3 5s. for those costs, but this sum is not included in the certificate of the English judgment. If the £3 5s. had been added to the amount for which the judgment mortgage was registered, namely the £990 debt and £6 19s. costs for which the English judgment was obtained, it seems to me that Mr. Walker might have had a more plausible objection to the registration, as being for an excessive sum. But he has wholly failed to show that the amount recovered in England for the debt and costs has not been validly registered as a mortgage because the £3 5s. for the Irish costs has not been added to it.

It is not disputed that the judgment mortgage, if valid, worked a forfeiture of the appellant's estate.

If I am right in stating that the proceeding under the Judgment Mortgage Act was one which the creditor was entitled to take, the English cases as to "judgment summons" and "bankruptcy notices" do not apply. But if they did, I should decline to follow them, as being inconsistent with the Irish decision that

an equitable execution by the appointment of a receiver is obtainable upon an English judgment registered under the Extension Act, and also against a course of Irish practice which I do not feel at liberty to question after it has prevailed, and has been recognized in every Irish Court, for forty years.

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HOLMES, L.J. :—

In the year 1850 a statute (13 & 14 Vict. c. 29) was passed, the effect of which was, in the case of judgments obtained thereafter in the Superior Courts in Ireland, to put an end to the procedure then existing for satisfying the judgment out of the real estate of the debtor. The remedy given in substitution therefor is to be found in the 6th section of the Act, which provides machinery for transferring to and vesting in the judgment creditor the debtor's estate in lands, tenements, or hereditaments, specified in an affidavit to be registered in the office for registering deeds in a manner fully and carefully prescribed. The estate so vested in the creditor is subject to redemption on payment of the money due on the judgment. He is thus placed in the position of a mortgagee by deed, and is given all the rights which an Irish mortgagee possesses for realizing the amount of his debt.

The consequence of this legislation is that a judgment mortgage is one of the best-known securities in this country, and is, as I have already said, the only means by which a judgment can be enforced against the debtor's real estate. Previous to the year 1868 an English judgment could not be made available against the debtor's property in Ireland; and an Irish judgment was similarly ineffective in England. A judgment obtained in either country was evidence of the debt, and could be sued on in the Courts of the other; but to impose on both parties the costs of a second action to enforce the same right in the same kingdom was a serious anomaly. To correct this state of things the Act 31 & 32 Vict. c. 54 was passed to render, in the words of its title, "Judgments or decreets obtained in certain Courts in England, Scotland, and Ireland, respectively, effectual in any other part of the United Kingdom." Section 1 provides for the registration by means of a certificate of an English judgment in Ireland and an Irish judgment in England, and enacts that on such registration the judgment

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shall be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment had been originally obtained in the Court in which it is so registered.

Section 6 provides that in any action brought in any Court in England or Ireland on any judgment which might be registered under the Act in the country in which such action is brought, the party bringing such action shall not be entitled to any costs unless the Court in which the action is brought, or a Judge thereof, shall otherwise order.

I agree with Vaughan Williams, L.J., in *Thompson v. Gill* (1) that the intention of these provisions was to place a judgment creditor, who had registered his judgment under this Act, in the same position as if he had brought an action on the judgment and obtained judgment in that action.

I was frequently consulted as a junior barrister in reference to this statute; and if I am to judge by my own experience, the registering a judgment thereunder in Ireland was, in the majority of cases, regarded as the first step towards converting it into a judgment mortgage of the debtor's lands. I am sure that it never occurred to anyone at that time that this could not be done; and there is no doubt that year after year such judgment mortgages have been placed in the schedules of incumbrances on lands sold by the Land Judge, and the amount due thereon paid out of the proceeds of the sale. During the last forty years this has been only once challenged (*In re Cox's Estate* (2)), when Ross, J., gave no decision or opinion upon it.

It will thus be seen that the matter now in controversy is of great general importance, inasmuch as we are asked to hold that an English judgment cannot be converted in Ireland into a judgment mortgage, and that the practice in this country is illegal.

The proposition of the appellant is based on sect. 4 of the Act of 1868, which provides that the English, Irish, and Scotch Courts "shall have and exercise the same control and jurisdiction over the judgments registered thereunder as they now have and exercise over any judgment in their own Courts, but only so far as relates to execution under this Act." The argument turns on

(1) [1903] 1 K. B. 760.

(2) [1900] 1 I. R. 269.

the last sentence. It is said that to convert a judgment into a judgment mortgage is not execution. The object of the section is, in my opinion, clear. It is to prevent an Irish or English Court from setting aside, altering, or amending a judgment of the Court of the other country. It must take that judgment as it finds it, and its duty is limited to enforcing it. But "execution" has not the narrow technical meaning which it is sought to give it. It is not confined to writs of execution under the Common Law. It means any legal step by which the creditor can enforce payment of what is due under the judgment. To hold otherwise would lead to the strange result that while an Irish judgment registered in England, where I understand the writ of *elegit* still exists, can be realized out of the debtor's real estate, an English judgment registered in Ireland cannot be enforced by the proceedings that have here taken the place of the writ of *elegit*. I have considered the authorities quoted on behalf of the appellant. *Thompson v. Gill* (1) and *Johnstone v. Bucknall* (2) support my view, for neither a receiver by way of equitable execution nor a garnishee order is an execution in the sense presented by the appellant. I think there is nothing in the other cases inconsistent with my construction of section 4; but I may be permitted to say that if this were otherwise, nothing short of a judgment of the House of Lords would lead me to reject an interpretation of the Act which is in accordance with its letter and spirit, and has been always acted on in this country.

I do not think it necessary to add anything to what has been already said on the second point presented on behalf of the appellant, but not, I think, seriously argued.

Solicitors for the trustees of settlement of 1886 : *Bates & Bates*.

Solicitors for the trustees of settlement of 1890 : *Meldon & Co*.

Solicitors for Arthur Cleland and Mrs. Cleland : *Collis & Ward*.

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(2) [1898] 2 I. R. 499.

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THE GROSVENOR CHEMICAL CO. v. GREENFIELD.

(1908. No. 663.)

Practice—Particulars—Trade mark—Infringement of—Rules Supreme Court (Ireland), 1891, Order XIX., Rule 7.

If the defendant, in an action for infringement of a trade mark, pleads that the plaintiffs' trade mark is invalid, he must give particulars of the invalidity alleged.

Rowland v. Michell (13 R. P. C. 457) followed.

MOTION.

This was an application on behalf of the plaintiffs for an order that the defendant deliver to the plaintiffs an account in writing of the following particulars, viz.—The grounds of the defendant's allegation in paragraph 1 of the defence, that the plaintiffs' trade mark is not a trade mark, and for the costs of the application.

The plaintiffs were a firm of soap-manufacturers carrying on business at the Elephant Soap Works in Belfast, and the defendant, who carried on business in Belfast, was a soap-manufacturer under the name of James C. Allerdice & Company. The plaintiffs' trade mark consisted of the word "Elephant," and the device of an elephant had been registered in respect of their soap preparations. The defendant's trade mark was the word "Jumbo," which had been registered in respect of their soap preparations. The plaintiffs alleged that the defendant had used the device of an elephant on his goods, and that there was an infringement of the plaintiffs' trade mark.

Paragraph 2 of the statement of claim was as follows:—"On or about the 11th day of March, 1899, the plaintiffs duly registered at the Patent Office a trade mark in respect of the soap preparations manufactured and sold by them. The said trade mark (No. 221, 388) was registered in Class 47 as prescribed by the Trade Mark Rules, 1890, under the Patent Designs and Trade

Marks Act, 1883." To this the defendant pleaded in paragraph 1 of his defence as follows :—"The defendant admits that the plaintiffs are registered as the proprietors of an alleged trade mark No. 221,398 in class 47, but he denies that the said trade mark is a trade mark, and that the plaintiffs are properly registered as the proprietors of the same." The defendant's substantive defence was that the figure of an elephant which he had put upon his goods was merely a representation of "Jumbo," the large and well-known elephant of that name. On receipt of the statement of defence the plaintiffs served a notice requiring particulars of the grounds of the defendant's objection to the validity of the plaintiffs' trade mark, and this notice not having been complied with the present motion was instituted.

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R. D. Megaw, for the plaintiffs :—

The plaintiffs are entitled to the particulars asked for : *Rowland v. Michell* (1), where a similar order was made by *Romer, J.*; *Kerly on Trade Marks*, p. 471.

Lowden, for the defendant :—

The defence in paragraph 1 is a simple denial of the allegations in paragraph 2 of the statement of claim, and is in the usual form. *Rules Supreme Court (Ireland)*, 1891, Appendix D, section vi.; *Kerly on Trade Marks*, Appendix xi., p. 725. It merely puts the plaintiff on proof.

THE MASTER OF THE ROLLS :—

There are no rules of pleading peculiar to actions for infringement of trade marks, but the general principles applicable to pleadings must apply in an action of this kind as well as in other cases. Paragraph 2 of the statement of claim is as follows :—"On or about the 11th day of March, 1899, the plaintiffs duly registered at the Patent Office a trade mark in respect of the soap preparations manufactured and sold by them. The said trade mark (No. 221,398) was registered in class 47, as prescribed by the Trade Mark Rules, 1890, under the Patent Designs and Trade

(1) 13 R. P. C. 457.

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Marks Act, 1883." The defendant meets that by a general traverse. "He denies that the said trade mark is a trade mark." Every possible objection that can be raised to the invalidity of the trade mark would be open to the defendant on that defence. I am of opinion it would be impossible for the plaintiffs to know from that defence what case they were called upon to meet. What does the defendant mean by saying: "The defendant admits that the plaintiffs are registered as the proprietors of an alleged trade mark, but he denies that the said trade mark is a trade mark"?

Apart from authority, on ordinary principles of pleading, the plaintiffs are entitled to know, what do you mean by that defence—what do you call upon me to reply to? But this is not a case of first impression, because I find that in *Rowland v. Michell* (1), an action for infringement of a trade mark, where the defendant by his defence said that the trade mark was not a trade mark, Romer, J., ordered the defendant to give particulars of the grounds of his objection to the validity of the plaintiff's trade mark, alleged in paragraphs 1 and 2 of the defence. That is just what the defendant has done here. He says, for some reason or other which he does not disclose, your registration is invalid. If pleadings are to have any value at all as defining and limiting the issues to be tried, I think that the defendant must give the particulars asked for. Counsel for the defendant has followed the form of defence given in the books both in England and Ireland. I shall therefore make the costs of this application costs in the cause. The particulars must be delivered within ten days.

Solicitor for the plaintiffs: *G. H. Quarry.*

Solicitors for the defendant: *Lyness & Hayes.*

W. L.

IN THE MATTER OF THE ESTATE OF FRANCES L.
WHITE AND ANOTHER.

Wylie, J.
1908.
Nov. 10, 26.

Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56)—Lands proposed to be acquired compulsorily—Price.

Where the Estates Commissioners, on the hearing of the owners' petition, fixed £1450 as the price of certain untenanted lands proposed to be acquired compulsorily, under the provisions of the Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56), which said lands comprised 178A. 2R. 12P., the poor law valuation of which was £83 10s., and the rental prior to eviction had been, as to portion, £36 7s. 5d., and, as to other portion, a second-term judicial rent of £50; and it appeared that the said lands were being used by the owners for grazing purposes, and that they were best suited for such purposes:—

Held, by the Judicial Commissioner, on appeal, that the sum fixed by the Estates Commissioners represented the full value of the lands.

The method of ascertaining the value of such lands discussed.

APPEAL from the determination of the Estates Commissioners fixing the price of certain untenanted lands proposed to be acquired compulsorily under the provisions of the Evicted Tenants (Ireland) Act, 1907, pursuant to section 2, sub-sect. 8, of the said Act.

The lands proposed to be acquired were situated in Queen's County, about four miles from Athy. They comprised four denominations. Three of these had been evicted upwards of twenty years ago, the rental at the time being £36 7s. 5d. The fourth, which had been subject to a second-term judicial rent fixed by agreement at £50, had been evicted for non-payment in June, 1905—£167 for arrears being due at the time.

The area of the entire lands was 178A. 2R. 12P., and the poor law valuation £83 10s. The owners had been using the lands, in conjunction with other adjoining lands in their possession, for grazing purposes, for which purpose it appeared the lands were best suited.

The lands had been valued by three different inspectors on

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behalf of the Estates Commissioners, who respectively estimated the value at £1036, £1188, and £1267. Offers to buy at each of these prices were made by the Estates Commissioners, but were refused by the owners, and on the hearing of a petition by the owners the Estates Commissioners increased their offer to £1450, and fixed the price of the lands at that sum.

The owners now appealed to the Judicial Commissioner from the determination of the Estates Commissioners fixing the price at the sum of £1450.

Herbert Wilson, K.C., for the owners:—

It is assumed that the price to be fixed for the lands must be arrived at exclusive of the bonus. Section 15 of the Evicted Tenants (Ireland) Act, 1907, provides that “the Land Purchase Acts shall apply, in the case of land acquired under this Act, in like manner as if the land were purchased by agreement.” The Estates Commissioners stated that they had arrived at the sum mentioned in their last offer exclusive of the bonus.

[WYLIE, J.: It has never been suggested that the bonus is not payable on the price fixed. It has been always assumed that it is payable. The concluding words of section 1, sub-sect. 1, would appear to emphasize this view.]

Herbert Wilson, K.C.:—

The owners consider the selling value of the lands is in or about £2000.

In support of this valuation the following witnesses were produced:—

Mr. Garby, a land valuer, arrived at this valuation by three methods:

(1.) By fixing what he described would represent a second-term judicial rent of the lands (*i.e.* £80)—twenty-four and a half years' purchase of £80, £1960; add £200, the value of the buildings (£200)—Total £2160; deduct from gross value for drainage, &c., £200: net valuation, £1960.

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(2.) By estimating the value of the lands at £10 per Irish acre, he arrived at the same valuation.

(3.) By taking the lands as a grass farm, the carrying power would be sixty two-year-old cattle, gross profit at £2 10s. per head, £150. Deduct wages for herd, £30; interest at 4 per cent. on £750, capital value of stock, £30; rates and taxes, £10; sundries, £10—Total, £80; net profit, £70.

It would take £2000 to produce this income in a $3\frac{1}{2}$ per cent. security.

Mr. Brown, who had been land agent over the estate for fourteen years, valued the lands at the same figure. He considered that £83 10s. would be equivalent to what would be a fair second-term judicial rent, taking the poor law valuation as the basis of his calculation, on the ground that in the case of twenty-three neighbouring holdings on which second-term judicial rents had been fixed, the amount of the rents was in all cases almost identical with that of the poor law valuation.

Captain White, one of the co-owners, who had been personally working the lands for grazing purposes, estimated the net annual profit at between £75 and £80, and considered that the value of the lands would be twenty-four and a half years' purchase of this.

Subsequently the Judicial Commissioner sent down an independent valuer, Mr. Cunningham, to inspect and value the lands. He estimated the annual value—on the gross fair rent of the lands and buildings as they stand in the owners' hands, the occupier paying all rates and taxes and maintaining the premises—at £61 10s. 7d., and considered that the land was worth twenty-three or twenty-three and a half years' purchase of that annual value, or from £1415 to £1445.

WYLIE, J.:—

Nov. 26.

This is an appeal from the Estates Commissioners under the Evicted Tenants Act as to the price fixed by them for land taken under their compulsory powers.

The case is a rather curious and interesting one. Three different inspectors independently valued the land at £1036,

Wylie, J. £1188, and £1267 respectively. An offer to buy at each of these prices was made, and all were refused; and, after a hearing by the Estates Commissioners on the owners' petition, they increased their offer to £1450, which the owners still consider too low.

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The evidence of value produced before me by the owners consisted first of the evidence of Mr. Garby, a valuer, who estimated the value at £2000, which he arrived at by three different methods. The first two methods are based upon £80, being what he calls a second-term fair rent for the land. I do not know exactly what he means by a second-term fair rent for untenanted land, and I think his third method gives me more assistance in arriving at the value of the land. He says the land would carry sixty two-year-old cattle, which would give a gross profit of £2 10s. per head or £150 in all. Then he deducts £30 for herd, £30 for 4 per cent. on capital, £10 for rates and taxes, and £10 for sundries, leaving a net profit of £70 per annum; and then he says it would take £2000 to produce this income at $3\frac{1}{2}$ per cent., and he fixes £2000 as the value of the land. In other words, he bases his value on the assumption that a precarious income of £70 per annum derived from the grazing of land is as well secured as the same income derived from $3\frac{1}{2}$ per cent. securities. I need hardly say that in that assumption I do not agree. Captain White, one of the owners, who has been working the land himself for three or four years as grazing land, fixed the net annual profit at about the same figure as Mr. Garby. Mr. Brown, the land agent, was also examined for the owners, and he valued the land at £2000. He did not, however, inspect or value the land himself, but based his figures on a comparison of the judicial rents of other holdings on the estate with the Government valuation of the same, and by that means came to the conclusion that £83 10s. would be the fair second-term rent of this land—a conclusion to which I can attach no weight for the present purpose.

Now, assuming for a moment the correctness of the estimate made by Captain White and his valuer, viz., that this land if used for grazing purposes, being the purpose for which it is most suitable, would produce an annual net profit of £70, what would be the capital value of that annual profit? Mr. Garby seemed to

think that the owner was entitled to such a sum as would, if invested at $3\frac{1}{2}$ per cent., give him that income. It is now well settled that he has no such right. If we apply to this the same rule that we apply in fixing the redemption-price of a superior rent, his right is to be measured by such a sum as when invested would produce an equal income equally well secured, together with something added for compulsory purchase. Now, supposing the land was put up for sale, and it was stated, in accordance with the figures which Mr. Garby has given me, that if used for grazing purposes, for which it is suited, it would produce a net annual profit of £70, how many years' purchase of that annual profit would it bring? Is there any income more precarious than that derived from a grazing farm? Would the security for that income rank with a $3\frac{1}{2}$, 4, $4\frac{1}{2}$, or 5 per cent. security? In my opinion it would rank much nearer 5 per cent. than any of the others, and, therefore, I think, twenty to twenty-one years' purchase, or £1400 to £1470, would be its full value on the above basis of income.

But as the three inspectors differed so much from each other as to the value of this land, and all differed so much from the value proved on behalf of the owner, I thought it advisable in this case to obtain the assistance of another valuer, of whose capacity, knowledge, and impartiality I have had ample experience, and I accordingly sent down Mr. Cunningham, who is entirely independent of the Land Commission, to inspect and value the land. Mr. Cunningham, after a careful inspection, sent me in his report, which I had afterwards an opportunity of fully discussing with him. According to Mr. Cunningham the annual value of the land is £61 10s. 7d., and by that he means what is now well known as the gross fair rent of land and buildings as they now stand in the owners' hands, the occupier paying all rates and taxes and maintaining the premises; and Mr. Cunningham is of opinion that the land is worth twenty-three or twenty-three and a half years' purchase of that annual value, or from £1415 to £1445.

In my opinion twenty-three and a half years' purchase of a rent of that character is a liberal price, and, having considered

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Wylie, J. carefully all the valuations as well as the evidence given by the
1908. owners, I think the last offer made by the Estates Commis-
In re sioners of £1450 is the full value of the lands, and therefore
WHITE'S I dismiss the appeal.
ESTATE.

Solicitors for the owners: *Wm. Roche & Son.*

J. E. W.

IN THE MATTER OF THE ESTATE OF ELIZABETH
HANNA WILLIAMS AND THE REV. GODFREY
JAMES WILSON, OWNERS ; WILLIAM GEORGE
ARMSTRONG, PETITIONER.

Ross, J.
1908.
Dec. 11.

*Irish Land Act, 1903, section 7—Offer by Land Commission to purchase—
Conditional offer.*

The offer by the Estates Commissioners, purporting to be made pursuant to section 7 of the Irish Land Act, 1903, for the purchase of an estate for sale in the Land Judge's Court, must be an offer capable of immediate acceptance, and one which will enable a test to be applied as between the offer and a subsequent sale by the Land Judge under the provisions of the section.

Therefore, where an offer by the Estates Commissioners, purporting to be made under the said section, was made subject to the condition that the Estates Commissioners should be able to obtain undertakings in the prescribed form from persons approved of by them to re-purchase the lands at the prices set out in the schedule to the offer :—

Held, that the offer was not an offer within the meaning of the section.

APPLICATION for directions.

The lands for sale in the matter were put up for auction in October, 1907. The bidding being insufficient, the Land Judge directed the solicitor having carriage to receive private offers, and gave him liberty to bring them before the Court. An offer was made to buy the estate for £1650, subject to head rent and tithes. This offer was brought before the Court on 28th October, and was supported by the owners and by the solicitor having carriage. The solicitor for the Estates Commissioners attended, and asked for an adjournment to enable their inspector to inspect, for the purpose of their making an offer under the 7th section of the Land Act, 1903. On the 2nd November, 1908, the Estates Commissioners made an offer to buy the fee-simple of the estate, which offer was in the following terms :—

Ross, J. “IN THE MATTER OF THE ESTATE OF ELIZABETH H. WILLIAMS
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In re TIONER; AND IN THE MATTER OF SECTION 7 OF THE IRISH
 WILLIAMS’ LAND ACT, 1903.
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“Whereas the Land Commission, having by direction of the Land Judge been furnished with particulars of the above estate, have caused same to be inspected.

“Now the Land Commission hereby offer, subject to the clauses and conditions hereinafter mentioned, to purchase in accordance with section 7 of the Irish Land Act, 1903, for the sum of £3000, the lands set out in the schedule hereto and included in the rental lodged in this matter in fee-simple, subject:—

“To any public rights affecting the said lands;

“To any maintenance charges under the Public Works Acts;

“To any interest of the tenants on the lands, or of persons having claims upon those interests, and to any easements, rights, and appurtenances mentioned in section 34 of the Land Law (Ireland) Act, 1896;

“To the mineral and sporting rights reserved to Thomas Pim, his heirs and assigns, or other the owner or owners thereof, his or their heirs and assigns, as same are excepted and reserved in and by a fee-farm grant dated 15th day of July, 1859, and made between Thomas Pim and Thomas Wilson and Margaret Wilson or in and by any superior grant in fee of the said lands;

“But, save as aforesaid, discharged from the claims of all persons who are interested in the lands, whether in respect of superior or intervening interests or incumbrances or otherwise;

“That the Estates Commissioners are able to obtain undertakings in the prescribed form from persons approved of by them to re-purchase the lands set out in the schedule hereto at the prices therein stated;

“Clear possession of all lands included in the schedule hereto to be given up to the Land Commission at or before the date of the final acceptance of this offer by the Land Judge, free and discharged from all tenancies or occupation interests of any description;

"All poor rates, drainage maintenance rates, sanitary rates, and all other rates and taxes, charges and assessments, payable in respect of the lands included in the schedule hereto, up to and including the assessment or levy made in respect of any such rates, taxes, charges, and assessments next preceding the date of the final acceptance of this offer by the Land Judge, to be paid, and the Land Commission to be indemnified in respect thereof ;

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ESTATE.

"In the event of the Land Commission being declared the purchaser of the said lands set out in the schedule hereto, the Estates Commissioners are prepared, if required, to declare the said lands fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903."

The matter now (December 11, 1908) came before the Court for the consideration of the offers. It appeared that there were no tenants on the estate, the lands being held on grazing lettings.

H. D. Conner, K.C., for the petitioner having carriage :—

The offer of the Estates Commissioners is not an offer within the meaning of section 7 of the Act of 1903. The offer is subject to the condition that the Estates Commissioners are able to obtain purchasers. There are no tenants on the lands. Therefore the estate will have to be held up, to see if any purchasers may turn up in the neighbourhood. An offer to pay £3000 at an indefinite time is not such an offer as is contemplated by the section. Three cases as to offers arise in the Land Acts—(1) under section 40 of the Act of 1896 the offer is made by the Land Judge to the tenants : here the tenants have the last word ; (2) under section 6 of the Act of 1903 a proposal is made by the Land Commission to the owner of the estate, and, if the owner agrees to sell, the Land Commission may agree to purchase : here the Land Commission have the last word ; (3) in cases under section 7 of the Act of 1903 the Land Commission makes an offer to the Land Judge for the purchase of the estate, and the Land Judge has the last word. In the present case the offer is one which gives the Land Commission the last word ; and the offer is not a clear offer to be accepted or rejected by the Land Judge. In *Madden's*

Ross, J. *Estate* (1), the Court of Appeal held that the object of sub-sect. 3 was to afford a test by public auction as to whether the offer was or was not a reasonable offer in price. The offer of the Land Commission must be one which enables a test to be made. The owners of this estate support the offer of the private person, and oppose the offer of the Land Commission. The offer here will tie up the estate, which was what the Court of Appeal in *Galway's Estate* (2) held the Land Commission could not do.

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Ronan, K.C. (with him *A. C. Meredith, K.C.*, and *De Renzy*), for the Land Commission :—

The power of making an offer under section 7 is subject to the provisions of section 6. The Court of Appeal in *White's Estate* (3) held that sections 6 and 7 applied to untenanted lands. Therefore the offer must be made subject to the provisions of section 6 as to re-sale, both as regards tenanted and untenanted lands. The "other persons" mentioned in section 6 are "those persons who were tenants within twenty-five years before the passing of the Act of 1903, and have since been evicted, and the several other persons who are enumerated in section 2, who can obtain advances for the purchase of parcels of untenanted land"—*Sullivan's Land Acts*, p. 57. In comparing the price obtained at a subsequent auction, the Land Judge must take into account the different times of payment, interest, &c.

A. C. Meredith, K.C. :—

The offer is not to be accepted until after the conditions are fulfilled. A conditional proposal is contemplated by section 6; a conditional offer is contemplated by section 7.

Jellett, K.C., for the intending purchaser for £1650.

Albert E. Wood, for neighbouring tenants, supported the offer of the Estates Commissioners.

Calvert, for Rev. G. Wilson, one of the owners, opposed the offer of the Estates Commissioners, and supported the other offer.

(1) [1907] 1 I. R. 351, 354. (2) [1906] 1 I. R. 137. (3) *Ibid.* 186.

Ross, J. :—

The effect of an offer by the Land Commission to purchase an estate under section 7 of the Land Act, 1903, is of great importance, having regard to the provisions of sub-section 3. It subjects the estate to an inconvenience of a serious nature.

The effect is to compel the Judge, if he declines the offer, to put up for sale not merely the particular estate ordered to be sold, but the fee-simple of the lands discharged from all superior interests. The offer being of such importance as affecting persons interested in the estates as owners or mortgagees, it is necessary to construe this document with precision, and ascertain whether it is really and strictly an offer within the meaning of the section.

Now, the Court of Appeal in *Madden's Estate* (1) held that in the case of sales by the Land Judge under this section the land cannot be put up for sale in the ordinary way by lots, that the object of the sale is for the purpose of a test, that for the purpose of applying the test the Land Judge must sell the very subject-matter that the Estates Commissioners have made the subject of their request. That being so, the offer to be made by the Estates Commissioners under the section must be an offer capable of immediate acceptance, and one that will enable the test to be applied. It is absurd to suggest that there can be any test as between money down, bid at an auction, which would have to be brought in within fourteen days, and an offer such as the present. The conditions may never be fulfilled; the money may not be available for years; no interest whatever in the meantime will be paid; the lands cannot be let, as immediate possession may be at any time required. Therefore this is not an offer within the meaning of the section.

But it is my duty to point out that there is no real difficulty in working the Act. Let the Estates Commissioners do as they have done in other cases. Let them write to the solicitor having carriage, or to my Registrar, to the effect that they are prepared to pay so much for the estate, provided they can get undertakings from tenants. This can be brought before the parties, and if they agree to take their chance the Commissioners will be in no

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(1) [1907] 1 I. R. 351, 354.

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difficulty. The estate will be relieved from the great inconvenience of the operation of the section as to a futile public auction.

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ESTATE.

Being of opinion that the offer of the Estates Commissioners is not an offer within the meaning of the section, I make no rule on the motion, and direct the matter to be put in the list for further consideration.

Solicitor for the petitioner having carriage: *W. G. Armstrong.*

Solicitor for the Estates Commissioners: *W. Alexander.*

Solicitor for the intending purchaser: *F. G. Sharpe.*

Solicitor for neighbouring tenants: *T. C. Murtagh.*

Solicitors for Rev. G. Wilson: *Harris & Greene.*

D. M. S.

Barton, J.
1905.
Dec. 7.

SULLIVAN *v.* ORPEN.

(1908. No. 856.)

Practice—Transfer of action to County Court—Claim for declaration of title—Constructive trust—Jurisdiction—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 50, s. 36).

Where an action is brought which, while claiming a declaration of title, is in substance for the purpose of establishing a constructive trust, the Court will, under proper circumstances, transfer the action to the County Court, under the County Officers and Courts (Ireland) Act, 1877.

MOTION.

The subject-matter of this suit was a moiety of a small farm, containing 67A. 3R. 30P., situated in the barony of Bere, and county of Cork. The poor law valuation amounted to £11, and the annual rent to £10. Both the plaintiffs and defendant resided at Bere, in the same civil-bill jurisdiction.

It appeared from the statement of claim delivered on behalf of the plaintiffs that the plaintiffs alleged that their maternal grandfather, Bartholomew Orpen, in the year 1873, on the occasion of his daughter's marriage to the plaintiffs' father, conveyed to the plaintiffs' father a moiety of the farm, and subsequently conveyed

the other moiety to another son, John Orpen. They also alleged that on their father and mother's death John Orpen, their uncle, went into possession of the entire farm, and remained in possession until his death, in 1906.

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The defendant was the widow of John Orpen. The farm had been purchased under the provisions of the Land Purchase Acts, and the defendant had been registered as the owner, "subject to equities," under the Local Registration of Title (Ireland) Act.

In an affidavit filed in support of the motion the defendant alleged that the plaintiffs were persons of no visible means. She disputed the conveyance by Bartholomew Orpen of a moiety of the farm to the plaintiffs' father, and suggested that a question might arise under the Statute of Limitations.

The relief claimed by the plaintiffs in the statement of claim was as follows :—

(1) A declaration that the plaintiffs were entitled in equal shares, as tenants in common, to one undivided moiety of that part of the lands of Derrycreeven, containing 17A. 3R. 30P. in the barony of Bere, and county of Cork, together with the right of commonage on Derrycreeven mountain appurtenant thereto.

(2) That the defendant be declared to be a trustee of the said lands and premises in trust for the plaintiffs.

(3) That the defendant be ordered to execute all necessary assurances, and do all acts necessary, to vest in the plaintiffs the shares to which they might be declared respectively entitled in the said premises.

(4) A sale of the said lands in lieu of partition.

(5) An account of the rents and profits of the said lands received by the defendant.

The present motion was instituted by the defendant to have the case transferred to the County Court, under section 36 of the County Officers and Courts (Ireland) Act, 1877.

C. Lehane, for the applicant :—

Although the statement of claim seeks a declaration of title, that is not the substance of the action, which is really brought to establish a constructive trust, which, of course, involves an investigation into the plaintiffs' title. The County Court has full

Barton, J. jurisdiction to investigate and determine a question of a constructive trust: *Clayton v. Renton* (1), decided by Stuart, V.-C., under provisions in the English Act conferring equity jurisdiction upon the County Court which correspond to those in the Irish Act. The case is in all respects a proper one to transfer to the County Court.

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Norwood, for the plaintiffs :—

Where the relief claimed is a declaration of title the County Court has no jurisdiction in such a case, which cannot, therefore, be transferred: *Comyn v. O'Dwyer* (2).

BARTON, J. :—

The law would be in a very unsatisfactory state if this action could not be transferred to the County Court. It is a small case, in which the plaintiffs can get all the relief which they require, as consequential to a declaration that the defendant is trustee for the plaintiffs in respect of a moiety of this farm, the annual valuation of which is £11, and the rent £10. The parties live in a remote part of the county Cork. I am glad to think that there is no difficulty in the way of transferring it. In *Clayton v. Renton* (1) Stuart, V.-C., held that constructive trusts were within the County Court jurisdiction. That was under the corresponding section of the English Act, conferring equity jurisdiction upon County Courts. Mr. Norwood refers me to an unreported decision of the late Master of the Rolls in a case of *Comyn v. O'Dwyer* (2). That was a case in which the only relief claimed was a declaration of title; so it has no application to this case. A claim for a declaration of title is unnecessary in the present case. Proof of plaintiffs' equitable title to a moiety of the farm will be one step in establishing that defendant, who has the legal estate in the whole farm, is a trustee for the plaintiffs in respect of that moiety. The jurisdiction of the County Court cannot be ousted by inserting an unnecessary claim in a pleading.

Solicitor for the applicant: *James Flynn*.

Solicitor for the plaintiffs: *J. Travers Wolfe*.

J. MAC M.

(1) L. R. 4 Eq. 158.

(2) Unreported.

IN RE BELFAST TAILORS' CO-PARTNERSHIP (LTD.)
AND THE COMPANIES ACTS.

M. R.
1908.

Nov. 24.

Companies Acts—Unregistered Company—Petition for compulsory winding up—Principles on which Court will act—Jurisdiction—Industrial and Provident Societies Acts (15 & 16 Vict. c. 31; 56 & 57 Vict. c. 39).

A petition was presented for the compulsory winding up of a Company which was registered under the Industrial and Provident Societies Act, 1893. The Company was not registered under the Companies Acts, and was in voluntary liquidation. The assets were small, but easy to realize. There was no question of difficulty to be investigated. The majority of the creditors were in favour of continuing the voluntary winding up:—

Held, that the Court had jurisdiction either to make an order for compulsory winding up, or continuing the voluntary winding up under the supervision of the Court, or of dismissing the petition altogether; and that, under the circumstances, the Court would dismiss the petition, and allow the voluntary winding up (without supervision) to continue.

APPLICATION by the Amalgamated Society of Tailors and Tailoresses, unsecured creditors, having their offices in Manchester, to have the respondent Company, the Belfast Tailors' Co-Partnership, Limited, wound up by the Court under the provisions of the Companies Acts, 1862, 1867, and 1907. The respondent Company was registered in 1902 under the Industrial and Provident Societies Act, 1893, and had business premises in Belfast, as wholesale and retail cloth merchants. The Company was not registered under the Companies Acts. They were indebted to the petitioners in the sum of £200 for money lent and interest thereon.

Previous to 1908 the Company was in a failing condition, and on October 26th of that year an extraordinary general meeting was held and the following resolution was passed:—That it had been proved to the satisfaction of this meeting that the Company cannot by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the Company be wound up voluntarily.



M. R. Mr. Hugh Brandon was appointed liquidator, and issued a
 1908. notice to creditors, pursuant to the Companies Act, 1907, sect. 27,
In re that a meeting of the creditors would be held at the offices of
 BELFAST Messrs. Brandon & Company, and requesting creditors to lodge
 TAILORS' Co- particulars of their claims.
 PARTNERSHIP

Meetings of the creditors and shareholders were duly held, and by large majorities voted in favour of continuing the voluntary winding up.

It was alleged by the petitioners that they had not received notice of the meeting of creditors.

The assets were small, and the debts amounted to more than £1000. There did not appear on the facts stated on affidavit to be any difficulty in realizing the assets or in winding up the Company.

O'Brien, K.C., and *Ellison*, for the petitioners :—

The respondent Society is registered under the Industrial and Provident Societies Acts, and is therefore not a registered Company within the meaning of the Companies Acts, and must be wound up as an unregistered Company. It cannot therefore be wound up voluntarily or under supervision, but must be wound up compulsorily : see Companies Act, 1862, section 199.

M'Grath, K.C., and *McGonigal*, for the respondent Company :—

In re Irish Mercantile Loan Society (1) does not apply to the present case. The Court has power to make any order it could make in the case of a petition to wind up a Company under the Companies Acts, 1862 to 1867 : see sect. 58 of 56 & 57 Vict. c. 39.

No order for winding up should be made in this case. Meetings of both the shareholders and creditors have been held, and in both cases large majorities voted in favour of continuing voluntary liquidation. The wishes of the majority of the creditors should prevail : *In re Langley Mill Steel & Ironworks Company* (2) ; *In re Uruguay Central & Hygueritas Railway Company of Monte Video* (3).

There is here no question of difficulty to be decided in the winding up. The assets are small and easily got at. There is

(1) [1907] I. R. 98. (2) L. R. 12 Eq. 26. (3) 11 Ch. D. 372.

no suggestion of anything fraudulent in the management of the Company. It is admitted that the voluntary liquidator is competent.

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THE MASTER OF THE ROLLS:—

I am informed that the case of *In re Irish Mercantile Loan Society* (1) has occasioned difficulty among practitioners. I was dealing there with a case under the Friendly Societies Acts, and not with a case coming under the Industrial and Provident Societies Acts. The Irish Mercantile Loan Society was an unregistered Company within the meaning of the Act of 1862, and there was no jurisdiction to make an order winding it up, save a compulsory order under the provisions of sect. 199 of that Act. There was no section in any Act of Parliament to mitigate the severity of the clause in sect. 199 (2):—"No unregistered Company shall be wound up under this Act voluntarily, or under the supervision of the Court." I did not intend to decide, nor do I think my judgment is open to the suggestion that I decided, that in the case of a Society like the present the Court had no power to make an order for winding up under supervision.

I had before me the cases of *The Independent Protestant Loan Fund Society* and *The Friendly Protestant Partnership Loan Fund Co.*, decided in 1894 by the Vice-Chancellor of Ireland (reported together—[1895] 1 I. R. 1).

The first of these cases came under the Friendly Societies Acts, and the learned Vice-Chancellor decided that he had no power to make any order for winding up, save a compulsory order. At page 2 of the Report he says:—"This Society (*i.e.* The Independent Protestant Loan Fund Society) was constituted and registered under the Friendly Societies Act in the year 1855, under the 18 & 19 Vict. c. 63. This Act was repealed by 38 & 39 Vict. c. 60, and it is by the latter Act that the Society is now regulated. It is not a registered Company under the Act of 1862, and can only be wound up under the 199th section of that Act as an unregistered Company. Under that section this Court has no power of winding up voluntarily, or under supervision; and the petition prays generally for a winding up by the Court." And at page 5 he

(1) [1907] 1 I. R. 98.

M. R. says:—"The objections to winding up voluntarily under supervision arising on the provisions of the 199th section do not appear to have occurred to the Society till after the petition was presented, but the prayer is large enough to include a compulsory order ; that was the order moved for, and which was supported by the Society. Under these circumstances it appears to me just and equitable to make the only order I can make to carry out the wishes of the Society, namely, an order for compulsory winding up."

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In the second case, viz., that of the Friendly Protestant Partnership Loan Fund Company, the Vice-Chancellor made an order for winding up under supervision. His judgment is so short that I take the liberty of reading it:—"This is an application for the voluntary winding up, under the supervision of the Court, of the Protestant Loan Fund Society, registered under the Industrial and Provident Societies Act, 1852. The facts are similar in all material respects to those of the case I have just disposed of. There is some difference in the law, as this Society is regulated by the Industrial and Provident Societies Acts, whereas the former Society is regulated by the Friendly Societies Acts. The Industrial and Provident Societies Act of 1852 was repealed by the Act of 1862, which was repealed by the Act of 1876, and again this was repealed by the Act of 1893, but all through the registration of existing societies was preserved. The 58th section of the Act of 1893 provides that a registered society, which is by the 79th section interpreted to mean a society registered or deemed to be registered under that Act, may be dissolved by an order to wind up the Company, or a resolution for the winding up thereof made, as is directed in regard to Companies by the Companies Acts, 1862 to 1890, the provisions of which shall apply to any such order or resolution, except that the term 'Registrar' shall, for the purpose of such winding up, have the meaning given to it by the Act of 1893; or by the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution. This is a re-enactment of section 17 of the Act of 1876, with the omission of the exception that the Court having jurisdiction in the winding up should be the County Court. *This incorporation of the Companies Acts brings the provisions of these Acts for winding up regis-*

tered Companies into operation as to Societies registered under the Industrial and Provident Societies Acts. Laying aside in this case also the claim of the petitioner as a creditor of the Society, I am of opinion that an order for winding up may be made under the 199th section of the Companies Act, 1862. I shall, therefore, make an order for winding up, under the supervision of the Court. The petitioner and the Company should have their costs in the matter."

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The keynote of the judgment is to be found in the sentence which I have taken the liberty to italicize.

Adopting this reasoning the consequences are obvious. The sections of the Companies Acts relating to voluntary winding up are applicable. Section 129 and sections 147-149 of the Companies Act, 1862, become part and parcel of the code regulating societies registered under the Industrial and Provident Societies Acts.

In the 8th edition of Buckley on the Companies Acts, the learned editor comments on the opening clause of section 129. The clause runs:—"A company under this Act may be wound up voluntarily," and the comment is as follows:—"But not an 'un-registered company,' section 199 (2) (and see note to section 199), except it be a society registered under the Industrial and Provident Societies Act, 1893: see 56 & 57 Vict. c. 39, s. 58."

The author does not refer to the Vice-Chancellor's decision, but his view as to the construction of the 58th section of the Act of 1893 appears to be identical with that of the learned Judge. It does not become necessary for me to decide whether or not in a case coming within sect. 58 (Act, 1893) the order for winding up under supervision should be made (as the Vice-Chancellor is reported to have decided) under sect. 199 of the Act of 1862. Possibly my familiarity with the Irish Land Code (in which so many persons and things "are deemed to be" what in fact they are not) has suggested the thought that, under sect. 58 (a) of the Act of 1893, industrial and provident societies registered under that Act should (for winding up purposes) be "deemed to be" registered companies under the Act of 1862, in which event the case of *In re London Indiarubber Company* (1) would have to be

(1) L. R. 1 Ch. App. 329.

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considered. It may be, however, that the Vice-Chancellor's view was that clause (2) of sect. 199 was repealed, so far as regards societies registered under the Industrial and Provident Societies Act, 1893. I express no opinion. Suffice it to say that under sect. 58, Act, 1893, I hold that I have in this case jurisdiction either to make an order for the compulsory winding up of this company, or to make an order for continuing the voluntary winding up subject to the supervision of the Court, or to dismiss the petition altogether. I intend to adopt the last of these three courses. I may say that in the case of the *In re Irish Mercantile Loan Society and Companies Acts* (1), I made the order with great regret, as the assets were small; but the difficulty of realizing the assets was very great, as they consisted of small sums payable by a great number of poor people, and the person appointed to collect and wind up was absent in America. It would have been tantamount to a denial of justice to dismiss the petition. The present is, however, a very different case. No doubt this Company has been in a bad state for a considerable time, and Mr. O'Brien has pointed out that bad as the position was in 1907, it became worse and worse in 1908; the debts had increased and the assets had materially diminished. The difference between this case and others where the assets were small, is that in every such case where an order was made for compulsory winding up or winding up under supervision there were some special circumstances requiring investigation by, or calling for assistance from, the Courts. It might be that a director or directors had acted in a way requiring explanation or perhaps examination of witnesses in open Court. It might be that the liquidator was the nominee of persons who were charged with not having disclosed all the facts. I lay down no rule that meagreness of assets in itself justifies the Court in refusing an order. The 29th section of the Companies Act, 1907 (7 Edw. 7, c. 50), merely crystallizes the decisions already pronounced by the Court of Chancery. An order for winding up may be made by the Court, even if the Company has no assets at all. But every case must be determined on its own facts, and the Court can never leave out of sight, as circumstances to be weighed and

(1) [1907] 1 I. R. 98.

considered, the nature and amount of the assets to be administered. Here the assets are small ; they are all ear-marked. There is no difficulty about getting them in. There is no suggestion that Mr. Brandon will not, as a liquidator in voluntary liquidation, not subject to the supervision of the Court, be able to realize such of the assets as are recoverable ; and the only possible suggestion of a special circumstance in the case is the circumstance that the particular creditor whom Mr. O'Brien represents is a creditor for whom the greatest sympathy must be felt. I must not allow my judgment to be swayed by that fact. The view I take of the case and of the authorities cited is that I am bound to have regard to the wishes of the majority of the creditors, who are of a different opinion from the petitioning creditors. I have no hesitation in stating that I adopt the view expressed by the learned author of Buckley's Companies Acts ; (8th edit.), p. 249 :—" *Ex debito justitiæ* applies only as between the creditor and the company. If a majority of creditors are of a different opinion from the petitioning creditor, the Court is bound, under sections 91 and 149, to have regard to their wishes, and may accordingly, if the company be in voluntary liquidation, and a majority of the creditors so desire, make a supervision order instead of a compulsory order, or refuse to make any order."

I refer to the following cases :—In *In re Langley Mill Steel and Iron Works Company* (1), Malins, V.-C., decided that a winding up order cannot be claimed *ex debito justitiæ* by an unpaid creditor against the wishes of a majority of the creditors who desire a voluntary winding up. In the course of his judgment the learned Vice-Chancellor says—" I will therefore not lay down a rule which would give power to any litigious creditor or shareholder in a company to have a compulsory order to wind it up against the wishes of all the rest." Again, in *In re Uruguay Central & Hygueritas Railway Company of Monte Video* (2), at page 383, Sir George Jessel says—" Now, under the 91st section it has been decided that the Court may have regard to the wishes of persons opposing a winding up petition. It has been decided that the section authorizes the Court even to refuse a

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(1) L. R. 12 Eq. 26.

(2) 11 Ch. D. 372.

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winding up order. I agree that as a general rule a creditor is entitled to a winding up order *ex debito justitiæ*; but that rule is not without an exception, and if ever there was a case of exception I think I have it here." The decision of Sir George Jessel, M.R., in that case was approved of in the case of *In re Chapel House Colliery Co.* (1) by the Court of Appeal. Now, if ever there was an exceptional case, I have it here—in the smallness of the assets, in the integrity and independence of the liquidator, and in the absence of any difficulty in winding up. I have it also in the fact that not a single person connected with the Company is accused of anything else but carrying on the business at a loss in the *bona fide* hope of a revival of trade. I dismiss the petition. The effect of any other order would be to prevent any trader from holding on through a period of temporary depression in expectation of better times. I am not convinced that the petitioners knew before they presented their petition how utterly useless an order by the Court for winding up in any form would be. I therefore make no order as to costs against the petitioners. They must abide their own costs. The liquidator is entitled to his costs out of the assets.

Solicitor for petitioners : *J. I. Donaghy.*

Solicitors for respondent Company : *J. Donnelly & Co.*

R. W. L.

(1) 24 Ch. D. 259.

IN THE MATTER OF THE ESTATE OF MARY AGNES
GANNON. PETER GANNON AND BERNARD GAN-
NON *v.* TERESA GANNON;

Appeal.
1908.
Oct. 27.
Nov. 2.

(1907. No. 1240.)

AND JOHN H. CALLAN AND JAMES H. MURPHY *v.*
PETER GANNON AND BERNARD GANNON (1).

(1907. No. 1272.)

*Mortgage—Future advances—Transfer of mortgage debt—Executor of mort-
gagor transferee of mortgage—Administration of assets—Secured creditor
—Priority.*

The transferee of a mortgage made to secure present indebtedness and future advances became, on the death of the mortgagor, the executor of the latter, and a party to a suit to administer the mortgagor's estate. After the date of the judgment for administration the executor was compelled to pay, under a guarantee, a debt due by the deceased mortgagor, and thereupon claimed to rank as a secured creditor against the lands comprised in the mortgage under the said mortgage, and the transfer thereof to him:—

Held, affirming the decision of Barton, J., that notwithstanding the payment having been made subject to the judgment for administration, the executor was entitled to rank as a secured creditor in respect of the sum so paid by him.

By an indenture, dated the 4th October, 1906, Mary Agnes Gannon as mortgagor (which term was expressed to include her heirs, executors, administrators, and assigns) granted to the Castlebellingham and Drogheda Breweries, Ltd., as mortgagees (which term was expressed to include their successors or assigns), certain freehold licensed premises, subject to redemption on payment by the mortgagor to the mortgagees of the sum of £400 and interest, together with such further or other sums as should become due by the mortgagor to the mortgagees, "whether on account of

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goods supplied, loans, credits, or advances, or otherwise howsoever, and whether for principal or interest, with interest as aforesaid.” The mortgage contained the usual covenants on the part of the mortgagor for the preservation of the license attached to the premises, and a covenant to deal exclusively with the mortgagees, for all malt liquor to be consumed thereon.

On the 22nd February, 1907, one Peter Gannon signed a guarantee securing the Hibernian Bank, Ltd., against any loss not exceeding £600, arising in respect of their transactions with the said Mary Agnes Gannon, who, at the date of the guarantee, was indebted to the Bank in the sum of £815.

By an indenture dated the 28th March, 1907, the Castlebellingham and Drogheda Breweries, Ltd., in consideration of £408 16s. 5d. (the amount then due for principal and interest on foot of the said mortgage of the 4th October, 1906), paid to them by the said Peter Gannon, assigned to him the said principal debt and interest, secured by the said mortgage, and the full benefit of all covenants thereby entered into by the said Mary Agnes Gannon; and by the said indenture the Castlebellingham and Drogheda Breweries, Ltd., as mortgagees, and the said Mary Agnes Gannon as beneficial owner, granted to the said Peter Gannon, his heirs and assigns, all the hereditaments and premises comprised in the said mortgage.

Mary Agnes Gannon died on the 23rd May, 1907, having by her last will appointed the said Peter Gannon one of her executors.

On the 12th December, 1907, Peter Gannon paid, under compulsion, to the Hibernian Bank, a sum of £100 11s. 8d. on foot of the guarantee of the 22nd February, 1907.

On the 3rd February, 1908, a primary decree for the administration of the real and personal estate of Mary Agnes Gannon was made in this consolidated suit, the plaintiffs in the one case being the said Peter Gannon and his co-executor, and in the second two creditors of the deceased.

Two further sums were subsequently paid by the said Peter Gannon to the Hibernian Bank on foot of the guarantee of the 22nd February, 1907—one of £502 1s. on the 13th April, 1908, and another of £19 17s. 8d. on 1st May, 1908, and he thereupon

claimed to rank as a secured creditor in respect of the sums so paid by him.

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By an order of Mr. Justice Barton, dated the 14th July, 1907, made on the hearing of a memorandum submitted to him by the Chief Clerk, it was declared that Peter Gannon was entitled under the said mortgage and transfer thereof to a charge on the premises comprised therein for the sum of £622 10s. 4d. paid by him to the Hibernian Bank, Ltd., by the above-mentioned instalments on foot of his guarantee to the Bank, with interest thereon; and against this order the plaintiffs in the second suit now appealed.

Herbert Wilson, K.C., and W. H. Brown, for the appellants:—

Peter Gannon is only entitled to rank as a secured creditor in respect of the principal and interest due on foot of the mortgage of 14th October, 1906, and the transfer thereof to him. The mortgage was an ordinary brewery mortgage, and was never intended to secure future payments such as those made by Peter Gannon to the Bank on foot of the guarantee. Peter Gannon was himself an executor of the deceased, and it was his duty to protect the estate; but if the order appealed against is allowed to stand, he will not only have got rid of his own liability to the Bank on foot of the guarantee at the expense of the estate, but also will have ensured the Bank, who were unsecured creditors only, being paid in full. Even if he could claim to be a secured creditor in respect of the first instalment paid by him to the Bank, it is submitted that he was an unsecured creditor only in respect of the subsequent instalments which were paid after the date of the decree for administration. That decree vested the estate in the Court for the purposes of distribution, and the Court must see that the rights of other creditors are not prejudiced by the act of the executor: *Shewen v. Vanderhorst* (1). The appointment of a receiver deprives the executor of his right of retainer and of the assets got in by the receiver: *Birt v. Burt* (2).

(1) 1 R. & M. 347.

(2) 22 Ch. D. 604.

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Oulton, K.C., and Cusack, for the respondent :—

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It is clear that the mortgage deed is wide enough to cover the sums paid to the Bank on foot of the guarantee, and that the mortgage could not have been redeemed without payment of those sums. That being so, the administration decree did not affect the respondent's rights. This obligation to pay the amount due on foot of the guarantee arose, and should be regarded as having been discharged before, the administration decree. The analogous right of an executor to retain his own debt can be insisted on by him after a decree for administration : *Sharman v. Rudd* (1).

Nov. 2.

THE LORD CHANCELLOR :—

The question in this case is, whether Peter Gannon, the respondent, is entitled to stand as a secured creditor in respect of the real estate of Mary Agnes Gannon for three sums amounting to £622 10s. 4d. paid by him to the Hibernian Bank in three instalments.

Mary Agnes Gannon bought a publichouse in Castlebellingham on the 4th October, 1906, and on the same day mortgaged it to a Brewery Company. [His Lordship referred to the material portions of the deed and continued.] It is plain that Mary Agnes Gannon could not have redeemed without paying any money the Brewery Company had advanced on her account.

On the 27th February, 1907, Peter Gannon gave a guarantee to the Hibernian Bank for advances to Mary Agnes Gannon up to £600. It is plain that if the Brewery Company had retained their mortgage and become guarantors on the 27th February, 1907, and paid any moneys to the Hibernian Bank, they would have been entitled under their mortgage to charge such payments against the premises. But what happened was, that Peter Gannon took a transfer of the mortgage on the 28th March, 1907, to which Mary Agnes Gannon was a party, and what was his position then? He stood in the place of the Brewery Company for all purposes, and Mary Agnes Gannon never could have redeemed the mortgaged premises without paying off all his advances.

Mary Agnes Gannon died on the 23rd May, 1907, and Peter

(1) 27 L. J. (N. S.) Ch. 844.

Gannon proved her will and became executor, and he was compelled by the Hibernian Bank to pay off her liability to the Bank on his guarantee in three sums, on the 12th December, 1907, 13th April, 1908, and 1st May, 1908. He and his co-executor instituted an action to administer the real and personal estate of Mary Agnes Gannon, and a decree for administration was made on the 3rd February, 1908. He then claimed to be a secured creditor on the lands comprised in the mortgage for the amount so paid by him to the Hibernian Bank on foot of the guarantee—a claim which is resisted by the appellants, who are simple contract creditors of Mary Agnes Gannon, on two grounds. They contend, in the first place, that the sums in question were not covered by the mortgage, and that Peter Gannon, as transferee of the mortgage debt, cannot claim to be secured by the mortgage in respect of these sums. This contention is disposed of by the terms of the mortgage deed itself, and of the transfer. The words of the mortgage, to which I have already referred, are as wide as possible; it is a security not merely for the principal sum advanced at the time, but for all further sums howsoever advanced, and the full benefit of that security and all the covenants contained therein was assigned to Peter Gannon by the subsequent transfer. The second contention put forward by the appellants is, that two of the instalments were paid after the date of the administration decree, and that it was not then competent for Peter Gannon, being himself an executor of the deceased, to pay these sums to the Bank, and claim to be a secured creditor to the prejudice of the simple contract creditors of the estate. Peter Gannon did not, however, make the payment voluntarily. If he had bought up a simple contract, and then claimed to be a secured creditor in respect of it, a very difficult question would arise as to whether he could prejudice other creditors by doing so; but he was compelled to pay to the Bank in discharge of an obligation existing prior to the administration decree. In my judgment, he was in no worse position as to the two payments made after the decree than an executor setting up a right of retainer—a right which would not be affected by the order of the 3rd February, 1908. We think that the order of Mr. Justice Barton was right, and the appeal must be dismissed with costs.

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FITZ GIBBON, L. J. :—

I concur. Under the terms of this mortgage, the transferee, as the assign of the original mortgagee, appears to me to have become entitled, with respect to whatever might be called "further advances" by him, to the same rights which the transferors had, including the benefit of all the mortgagor's covenants. As to the money to be secured, the words of the deed are as wide as possible; they include not only money lent or paid, but also money "otherwise howsoever" due from the mortgagor to the mortgagee, at the time when the security is to be enforced. Though it was a "brewery mortgage," and may have been primarily intended to secure the price of beer, the company would have been entitled to cover by it money paid under a guarantee. Value having been given here, and the money having been paid under compulsion of a guarantee, it appears to me to follow that the lands could not be redeemed until the covenants had been performed, and the money due had been paid, unless the administration proceedings make a difference. In my opinion they do not; whether a decree for administration had been made or not, at least unless or until the Court took possession of the mortgaged property, the rights of the parties to deal with it would still be governed by the deed, and I cannot see that making an order for due administration of the assets put an end to the power of the mortgagee to take advantage of his security in respect of money which he had become liable to pay, and had paid so as to bring the amount within the mortgage, before the Court had interfered with the possession or disposition of the property. The distinction is obvious between this case and that in which it was held that an executor could not exercise the power of retention for payment of his own debt over money which had come to the hands of a receiver appointed by the Court. No man can *retain* what he has never received, the receiver had got the money *in usum jus habentis*, and had so intercepted the opportunity for retention by the executor.

HOLMES, L.J., concurred.

Solicitor for the appellant: *Thomas O'K. White.*

Solicitors for the respondent: *Smyth & Son.*

IN RE CAVANAGHS' ESTATE.

Wylie, J.
1908.

Dec. 16.

Appeal.
1909.

Jan. 22.

Landlord and tenant—Sale of middleman's estate to occupying tenants—Arrears of head-rent—Interest in lieu of rent—Jurisdiction, Land Commission—Land Law (Ireland) Act, 1896, s. 35 (2)—Landlord and Tenant Act, 1860, s. 20—Purchase of Land Act, 1885, s. 10.

Where a middleman had entered into agreements with his tenants for the sale of their holdings under the provisions of the Land Purchase Acts, and the head-rent had fallen into arrear, the head landlord applied for an order that the interest payable by the occupying tenants in lieu of rent, under sect. 35 (2) of the Land Law (Ireland) Act, 1896, be paid to him in discharge of the arrears and future accruing gales of head-rent before any payment should be made to the middleman as vendor :—

Held, by Wylie, J., that the head landlord came within the equity of section 35 (2) of the Land Law (Ireland) Act, 1896, and that he had jurisdiction to make the order.

Held, by the Court of Appeal (reversing the order of Wylie, J.), that the head landlord did not come within the words "or such other person as may prove himself entitled thereto" in the section, and that therefore the order could not be made.

Held, also, that section 10 of the Land Purchase Act of 1885 did not apply.

Held, also, by FitzGibbon and Holmes, L.JJ., that the head landlord could not adopt the procedure introduced by section 20 of the Landlord and Tenant (Ireland) Act, 1860.

MOTION by the Commercial Union Assurance Company for an order that no further payment of interest payable under sect. 35, sub-sect. 2, of the Land Law (Ir.) Act, 1896, be made to the vendors under the order endorsed on the originating application in the matter, until the sum of £261 11s. 9d., being one and a half year's head-rent due to the applicants, and all accruing gales of the head-rent of £174 7s. 10d., payable to the applicants by the vendors under the lease under which the estate in the matter was held, be paid and discharged, and that in the meantime the said interest might be directed to be paid to Messrs. William C. Hogan & Sons, agents of the applicants, on account of the said

Wythe, J. arrears of rent and accruing gales thereof, until same should be
 1908. discharged, and that after same had been paid and discharged all

In re further gales of the said head-rent should be paid to the said Messrs.
 CAVANAGHS' William C. Hogan & Sons, as such agents, out of said interest,
 ESTATE. before any payment should be made to the vendors, they, the said
 Messrs. William C. Hogan & Sons, undertaking, until such arrears
 and accruing gales of said head-rent should be discharged, to pay,
 in the first place, out of such interest, the lay tithe rentcharge of
 £6 18s. 6d., payable to the Corporation of the City of Kilkenny,
 and the ecclesiastical tithe rent-charge of £6 18s. payable to the
 Irish Land Commission.

Agreements for sale had been entered into between the vendors and the occupying tenants, but none of the purchase-money had been paid into the Bank of Ireland, and the Land Commission were collecting the interest under sect. 35 (2) of the Land Law Act, 1896. The aggregated purchase-money mentioned in the agreements amounted to £8047, and the interest in lieu of rent payable thereon under the agreements amounted to £281 13s. There was no question as to the amount of the head-rent due to the landlord.

S. L. Brown, K.C., in support of the application :—

Prior to the sale, two remedies were open to the landlord if his immediate tenant neglected to pay his rent : (1) to bring ejectment proceedings, or (2) to serve motion under sect. 20 of Deasy's Act on the sub-tenants to pay so much of their rent as was mentioned in the notice to him direct. Both remedies are suspended by the land purchase proceedings. The Court has jurisdiction over the moneys it is receiving from the sub-tenants, and has power to order that right be done.

C. Cavanagh (1), in person, on behalf of himself and his co-owners :—

We are prepared to pay the sum due to Mr. Brown's clients so soon as we receive a sufficient sum of interest in lieu of rent from the Land Commission. The Court has no jurisdiction to

(1) Mr. Cavanagh is a member of the English Bar.

make the order sought. There is no lien or charge on the part of the head landlord on this interest in lieu of rent until he has obtained a judgment and proceeded thereon. The words in sect. 35 (2) of the Act of 1896, "or such other person as may prove himself entitled thereto," must be confined to their strict legal meaning. They may include a mortgagee, but certainly do not include a head landlord.

Wylie, J.
1908.

In re
CAVANAGHS'
ESTATE.

WYLIE, J. :—

I agree with Mr. Cavanagh's contention that the head landlord has not at present any charge upon the purchase-money or the interest payable thereon in respect of arrears of head-rent, and that he cannot get hold of the interest in lieu of rent payable by the tenant purchasers, or interfere with its payment to Mr. Cavanagh, unless through the medium of sect. 20 of Deasy's Act. Now, sect. 20 of that Act provides that where the middleman neglects to pay the head-rent, the head landlord may, pursuant to the provisions of the section, serve notice on the sub-tenant requiring him to pay to the head landlord so much of the rent payable by the sub-tenant to the middleman as may be sufficient to discharge the gale or gales stated in such notice to be due from the middleman to the head landlord, and thereupon such sub-tenant shall be liable to pay to the head landlord all rent that may accrue due after the receipt of such notice, or so much thereof as may be sufficient to discharge such gale or gales.

Now, seeing that under that section, had the sale not taken place, the sub-tenant would, upon receiving notice of arrears due, have been liable to pay, and could have protected himself by paying, all such arrears due by the middleman to the head landlord, it would seem to me an extraordinary thing to hold that where the middleman has by agreement with his sub-tenant under the Land Purchase Acts substituted for the sub-tenant's rent interest in lieu of rent for many years to come, and where sect. 35 of the Act of 1896 provides that the sub-tenant is to pay the interest in lieu of rent to the Land Commission, and thereby takes away from the sub-tenant the power to pay it to anyone else, the Land Commission have no power to give the same protection to

Wylie, J. the sub-tenant, or the same relief to the head landlord, that they
 1908. would have been entitled to if the middleman had not sold.
In re Inasmuch, therefore, as the head landlord would have been
 CAVANAGHS' entitled to receive the gales of rent from the sub-tenant direct
 ESTATE. under the provisions of sect. 20 of Deasy's Act, it seems to me the
 head landlord comes within the equity of the terms of sect. 35 (2)
 of the Act of 1896, as "such other person as may prove himself
 to be entitled thereto." Any other construction will work great
 injustice during the years that will elapse between the lodgment
 of agreements and the advance of the purchase-money.

Under sect. 20 the head landlord, by serving the prescribed
 notice, could have claimed payment from the sub-tenant direct,
 and I hold that the Land Commission is bound to give the sub-
 tenant and the head landlord the same protection and relief.

Accordingly, I will declare that the interest in lieu of rent is
 applicable to pay off unpaid gales of rent due to the head land-
 lord, of which the Land Commission have had notice. This seems
 to me to be the only way to carry out the provisions of sect. 35 of
 the Act of 1896 in the light of sects. 20 and 21 of the Act of 1860.
 If I have no power to do this, then a tenant for life, by selling the
 estate, may insist upon getting the entire interest in lieu of rent
 without paying any outgoings, thereby depriving persons having
 prior claims against the land of their former remedies, and allow-
 ing all to accumulate for years against the fee, because no claims
 against the land attach to the purchase-money until after the
 advance is made. The Land Commission have got notice that
 £261 11s. 9d. arrears of head-rent have not been paid. I will
 make an order that the interest in lieu of rent be paid to the
 head landlord until that amount is paid off.

J. E. W.

Appeal.
 1909.

The vendors appealed (1).

Jan. 22.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-
 GIBBON and HOLMES, L.JJ.

C. Cavanagh, in person, in support of the appeal:—

Appeal.
1909.

The question arises here whether the Land Commission have power, on the application of the head landlord, to order payment to him of the interest payable by the occupying tenants in lieu of rent. It is under the concluding words of sect. 35, sub-sect. 2, of the Land Law (Ireland) Act of 1896, that Wylie, J., held that he had power to do this. The words are, “or such other person as may prove himself entitled thereto.” But the head landlord is not such a person. There is no privity of contract or estate between him and the sub-tenants.

In re
CAVANAGHS’
ESTATE.

Apart from statutory enactments, a head landlord has no right to interfere with the rents payable by sub-tenants: *Edge v. Boileau* (1), where such interference was held a breach of the covenant for quiet enjoyment in the head lease. The provision of the Act of 1903 as to intervening interests (section 24 (5)) only applies after the advance has been lodged in the Bank; “in respect of the annual income of his claim” implies that the charge has been redeemed and has been attached to the purchase-money. [THE LORD CHANCELLOR: The effect was to enable the Court to anticipate allocation.] Under section 35 (1), pending completion the rent payable by the occupying tenant is in suspense: Order IX. (1907). Wylie, J., relied on section 20 of 23 & 24 Vict. c. 154 (Deasy’s Act). But it is impossible to comply with that section. Even if the money payable by the sub-tenant was to be treated as rent, notice in writing requiring payment to the head landlord must be served on the sub-tenant. No such notice was served here. How could the receipt of the head landlord discharge the sub-tenant against the claim of the Land Commission? This provision, coupled with section 21 of the same Act, allowing voluntary payment by a sub-tenant, was intended to protect the sub-tenant from eviction through the default of the middleman—an object conspicuous throughout the Land Code (section 15 of the Act of 1881, and section 12 of the Act of 1896). The agreement for sale works an equitable conversion: *In re Sherlock’s Estate* (2). [Brown, K.C., intimated that this was not disputed.] Rent is

(1) 16 Q. B. D. 117.

(2) [1899] 2 I. R. 561.

Appeal.
1909.
In re
CAVANAGHS'
ESTATE.

provisionally gone after the agreement with the tenant has been lodged: *Vickery v. Deane* (1). Any attempt to evade the Act in this respect is inoperative: *Nash v. Neazor* (2); *Burchall v. Coyle* (3), quoted by Meredith, J., in his judgment in *Crosbie's Estate* (4), shows the distinction between rent and interest.

As to general principles of construction: *In re Sutton Coldfield Grammar School* (5); *Law Union and Crown Insurance Company v. Hill* (6).

S. L. Brown, K.C., for the Commercial Union Assurance Company:—

I admit that notice under section 20 of Deasy's Act could not have been effectively served. But under section 10 of the Purchase of Land Act, 1885, the Land Commission have all the powers of the Land Judge under sections 64 and 65 of the Landed Estates Court Act. Under section 65 there was clearly power to make an order of this kind. Under its general jurisdiction the Land Commission could apply any funds at its disposal for the purpose of protecting the lands for sale from eviction.

THE LORD CHANCELLOR:—

The question on the appeal turns on the construction of s. 35, sub-s. 2, of the Act of 1896, and the right of the Insurance Company to be paid the interest representing the former rent under the words "or such other person as may prove himself to be entitled thereto." I do not think the Company has given such proof. I express no opinion whether, if they had served notice under section 20 of Deasy's Act, 1860, they could by that means furnish such proof. Mr. Brown admits that his clients could not serve such notice. We will decide if necessary that section 10 of the Purchase of Land (Ireland) Act, 1885, does not apply. Therefore the only question we have to consider is the meaning of the words of section 35 of the Land Law (Ireland) Act, 1896.

(1) 32 L. R. Ir. 36.

(2) [1908] 2 I. R. 46.

(3) 37 Ir. L. T. R. 176.

(4) [1907] 1 I. R. 116.

(5) 7 App. Cas. 91.

(6) [1902] A. C. 263.

The interest on the purchase-money is made rent for the purpose of the section ; and, subject as therein mentioned, is to be paid to the person in receipt of the rent at the date of the agreement, or such other person as may prove himself entitled thereto. This Company are neither mortgagees, assignees, nor trustees, nor do they fill any other position which would make them owners. The words of the section are equivalent to this—it is rent for the purposes of the section, and must be paid to the person entitled to it, or who proves himself to be the owner of the rent. Those conditions do not exist here ; therefore we must allow the appeal with such costs as are payable when the appellant appears in person, taking into account that he has been obliged to travel to Ireland.

Appeal.
1909.
In re
CAVANAGHS'
ESTATE.
The Lord
Chancellor.

FITZ GIBBON, L.J. :—

The difficulty in the way of Mr. Brown's clients which I can not overcome is that neither they nor the Land Commission, as the case now stands, can be brought within the terms of Deasy's Act, sect. 20, so as to be qualified to give a receipt, for interest paid in lieu of rent, which would be " a full discharge to the sub-tenant against the tenant in respect of all rent so paid," within the words of that section ; and I can find no other authority for paying the appellants money to the respondents.

HOLMES, L.J. :—

In reference to the admission made by Mr. Brown that notice could not be served under the 20th section of Deasy's Act, I entirely agree with that view, and would have so decided. I would hold that the relation of landlord and tenant had ceased to exist, and that the section does not apply ; and I think Mr. Brown was quite right in making the admission.

Solicitors for the Commercial Union Assurance Co. : *Hogan & Son.*

W. G.

Barton, J.

1907.

April 27.

May 1, 3.

Appeal.

Nov. 6, 8, 19.

IN RE MAHER, DECEASED.

MAHER *v.* TOPPIN.

(1906. No. 1902.)

Will—Construction—“Next-of-kin and nearest heir of my name and family.”

A testator by his will disposed of his property, which consisted of both real and personal estate, amongst his children, and provided that if they should die without issue such property should go “to my next-of-kin and nearest heir of my name and family” :—

Held, by Barton, J., and the Court of Appeal, that upon the death of testator’s children without issue his personal estate went to his next-of-kin, to be ascertained at his death, and that his real estate went to his eldest son, who was at his death his nearest heir of his name and family.

ORIGINATING SUMMONS.

The question raised by the originating summons (which by direction of the Judge was, on 11th December, 1906, adjourned into Court for disposal) was as to the true construction of the will, dated 26th February, 1868, of William Maher, deceased, who died on the 3rd March, 1868. Testator was possessed of both real and personal estate, and by his said will he left portions of both descriptions of property to his elder daughter Mary Maher, some of those portions, however, being in trust for his sons Daniel and John. The said will continued :—“ It is also my will that my second daughter Catherine Maher, now Catherine Connell, shall have during her natural life the racecourse farm at Kilnockin, known by the name of Kennedy, Carews, and Blackmore Quarter. It is also my will that if my said second daughter shall have issue, said issue when of a proper age shall have and enjoy said racecourse farm ; but in case my said second daughter shall have no issue, it is in such case to go to my next-of-kin and nearest heir of my name and family. It is also my will that if my eldest daughter, or my aforesaid sons, Daniel Maher and John Maher, should die without lawful issue in such case, the premises . . .

hereby demised and bequeathed to the said Mary Maher, Daniel Maher, and John Maher shall go to my next-of-kin and nearest heir of my name and family." Mary Maher, Catherine Connell, and Daniel and John Maher survived the testator. Mary, Daniel, and John died unmarried and intestate, and Catherine Connell died intestate and without issue, her husband having predeceased her. Daniel died in 1888, John in 1895, Mary in 1904, and Catherine in 1906. On the death of Mary, letters of administration were granted to Catherine. The petitioner, Richard Maher, was the elder son of John Maher, a brother of William Maher, and he was administrator *de bonis non* of William Maher. The defendant was administrator of Catherine Connell.

Barton, J.
1907.
MAHER
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Matheson, K.C. (A. V. Matheson, with him), for the plaintiff Richard Maher:—

The expression "next-of-kin, and nearest heir of my name and family," does not describe a class; it describes one person only: the gift is to a *persona designata*, who must answer the description. The words "next-of-kin" and "heir" are not used in their technical sense. Both the gifts are contingent; therefore the person to take is to be ascertained at the happening of the contingency, and not at the death of the testator: *Pyot v. Pyot* (1), *per* Lord Hardwicke, at p. 338; *Power v. Quealy* (2), *per* May, C.J., at p. 229; *Clapton v. Bulmers* (3). The first gift over to take effect was that on the death of Mary Maher; at that time Catherine Connell was alive, and was the nearest of kin to the testator living; but she was not of the testator's name, as she then bore her husband's name: *Bon v. Smith* (4); *Jobson's Case* (5); *Pyot v. Pyot* (1); *Leigh v. Leigh* (6); *Carpenter v. Bott* (7); *Doe v. Plumtre* (8). The governing words are "of my name and family": it is the person, of those bearing the testator's name, Maher, who at the happening of the contingency is nearest of kin to him. Next-of-kin here means nearest of kin; the plaintiff was at Mary Maher's death the nearest of kin to the testator who bore

(1) 1 Ves. Sen. 335.

(2) 2 L. R. Ir. 227.

(3) 5 My. & Cr. 108.

(4) Cro. Eliz. 532.

(5) Cro. Eliz. 576.

(6) 15 Ves. 92.

(7) 15 Sim. 606.

(8) 3 B. & Ald. 474.

Barton, J. the name of Maher, and is therefore entitled under this gift. The
 1907. other gift over took effect on Catherine Connell's death : the plain-

MAHER tiff at that time answered every part of the description : he was
v. the next-of-kin, and the nearest heir of the testator living, and he
TOPPIN. was of the testator's name and family, and is therefore entitled.

Chaytor, K.C. (with him *Corvan*), for the defendant, personal representative of Catherine Connell, deceased :—

If the class or individual intended by the words, " my next-of-kin and nearest heir of my name and family," is to be ascertained at the death of the testator, no question arises upon the meaning of these words, as Catherine Connell had in her at the time of her death all the estate and interest, both of the testator's heir-at-law and next-of-kin. The death of the testator is the time to ascertain the class or individual. The law bearing on the point is well summarized in Hawkins on Wills, pp. 101, 102. The cardinal rule of construction is that a devise or bequest to next-of-kin means the next-of-kin living at the death : *Bird v. Luckie* (1), *Bullock v. Downes* (2). Similarly when the devise is to the heir : *Holloway v. Holloway* (3). The same rule applies whether the gift to the next-of-kin is immediate, or preceded by a life estate, or is contingent : *Urquhart v. Urquhart* (4); and even if the tenant for life be the sole next-of-kin : *Holloway v. Holloway* (3), *Ware v. Rowland* (5). *Clapton v. Bulmer* (6) is distinguishable, as the words are different, and the case was decided on an inference from the context. In any event, as pointed out by Hawkins (p. 102), the rule is more strictly followed now. What the testator manifestly had in his mind was the ultimate limitation in a settlement where the prior limitation had failed, viz., that the real estate was to go to his heir-at-law, and the personalty to his next-of-kin. Assuming that the defendant is wrong in this contention, and the class or individual is only to be ascertained as each gift over takes effect, still he must succeed, save as to the racecourse farm, the gift over of which did not take effect until the death of Mrs.

(1) 8 Hare, 301.

(2) 9 H. L. Cas. 1.

(3) 5 Ves. 399.

(4) 13 Sim. 613

(5) 2 Phill. 635.

(6) 5 My. & Cr. 108.

Connell, because upon the death of the elder son, Daniel Maher, intestate, his surviving brother, John Maher, took the realty, and he and his two sisters, Mary Maher and Catherine Connell, the personalty bequeathed to him, and upon the death intestate of John, the two sisters took the property bequeathed to him, and upon the death of Mary, Catherine took all her property, as her heiress and sole next-of-kin. It is argued that Catherine Connell did not answer the description in the gift over, as she did not bear the name of "Maher" when the gift over took effect; but she was of the stock of Maher, which is sufficient: *Pyot v. Pyot* (1), *Carpenter v. Bott* (2).

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Matheson, in reply :—

The cases cited by defendant have no application. This is not a gift to a class, and every case cited was a gift to a class. No case was cited where the expression "next-of-kin" clearly referred to one person only, as here. *Clapton v. Bulmer* (3) is the only case of that class, and is in our favour.

BARTON, J. :—

At first I was much impressed by Mr. Matheson's contention, that this was a gift, not to a class, but to a person to be ascertained at the date of the failure of the previous estate. If that were so, a number of questions would arise. Is "name" used in the primary sense so that nobody but a person of the name of Maher at the date of the failure of the previous estate could satisfy the description; or in the sense of "stock," as in *Pyot v. Pyot* (1) and *Carpenter v. Bott* (2), so that a change of name by marriage would be immaterial? There would also arise the question what property passed on the death of Mary Maher. She was given three classes of property under the will. A part was given to her absolutely; a part in trust for her two brothers, but in the event of their not being able to manage said farm then for her absolutely; and part was given to her, the profits to be applied for the respectable maintenance of her two brothers. There would also arise the question, What is the true construction of the latter gift? and the

May 3.

(1) 1 Ves. Sen. 335.

(2) 15 Sim. 606.

(3) 5 My. & Cr. 108.

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further question, What happened at the respective deaths of John and Daniel as regards the property which was held in trust for them?

However, not without hesitation, I have come to the conclusion that these questions do not arise, and that the true construction of the will should be that for which Mr. Chaytor contends. In arriving at that conclusion, I feel bound to say that I find it very difficult to do more than speculate at the testator's intention; but he has used technical words which bring the bequest under certain rules of construction by which, I think, I should be guided.

The first point which I wish to emphasize is that the testator has chosen to use expressions which he must have known have a technical legal meaning—namely, “next-of-kin” and “heir.” I think I should attribute to him that knowledge, and that he contemplated and intended that they would carry that meaning for purposes of construction. In that respect the case differs from *Power v. Quealy* (1), where the words were “nearest and most deserving male cousin and regular Power of the family,” all unconventional, untechnical words, clearly contemplating that an individual would have to be ascertained who should answer to the description. I think that the unconventional words of that will are to be contrasted with the legal phraseology of the gift in the present case. Here the testator uses the words, “my next-of-kin” and then proceeds also to add “and nearest heir of my name and family.” Now the testator's estate consisted of mixed realty and personalty. Some of the premises were held in fee or for a freehold tenure; the larger portion were chattels real, and there were some personal chattels. When I find a testator with a mixed estate of that kind using the words “next-of-kin” and “nearest heir,” I am disposed to find the explanation of the words in the mixed nature of the property. I have come to the conclusion that the true construction of the will is not that which at first sight seemed to me the most probable, but the much more commonplace construction for which Mr. Chaytor mainly contended, namely, that he intended the personal property

(1) 2 L. R. Ir. 227; 4 L. R. Ir. 20.

to go to the next-of-kin, and his real property to go to the nearest heir of his name and family. Several other arguments might be used in favour of this construction, *e.g.*, that "my next-of-kin" does not aptly describe an individual, and is not with any certainty cut down to that meaning by the subsequent words. He does not say "the nearest of my next-of-kin." He made the gift to the whole of his next-of-kin. I am aware of cases where a single word like "relation" or "heir" has been held to refer to a class; but I am not aware of any where "my next-of-kin" has been held to mean "one of my next-of-kin." But I mainly proceed on the use of these legal technical words "my next-of-kin" and "heir" by a testator whose property consisted of mixed realty and personalty.

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Having come to that conclusion, the construction becomes very simple, because, the testator having chosen to use the terms "next-of-kin" and "heir," a well-known general rule of construction becomes applicable—namely, that, unless there is a very clear indication of a contrary intention, the object or objects are to be ascertained at the death of the testator. This rule applies whether the bequest is immediate, or preceded by a life interest, or contingent, or by way of executory limitation. Even if there were words of futurity, it would not alter the rule, and there are no words of futurity here. In order to escape the rule, there must be some such word as "then," directly referable to the death of the tenant for life. There is nothing of the kind here. *Mr. Matheson* naturally laid great stress upon the fact that the preceding estates were given to persons who would be next-of-kin if alive at the testator's death. He asked whether the testator could have intended them to take under the gift. But it has been frequently held that the fact that the preceding estate was given to the person who is one of the next-of-kin, or the sole next-of-kin, does not affect the rule. I am afraid that I should be incurring the risk of making one of those decisions which Lord Campbell in *Bullock v. Downes* (1), and Lindley, L.J., in *In re Ford* (2), described as "erratic," if I were in the present case to depart from that rule. All the grounds which have been

(1) 9 H. L. Cas. 1.

(2) 72 L. T. 5, 7.

Barton, J. suggested for doing so, were urged and rejected in the cases which
 1907. have been cited here.

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This view of the case renders it unnecessary for me to discuss the authorities on the word "name," or the construction of the three gifts to Mary Maher. I hold that, upon the true construction of the will, on the death of Catherine Connell, John Maher, Daniel Maher, Mary Maher respectively, the properties which had been bequeathed and devised to them passed as regards personal estate to the next-of-kin of the testator to be ascertained at his death, and as regards realty to his elder son, who was at his death his nearest heir of his name and family.

It is a coincidence, of which I was not aware until the case had been opened and the will read, that the testator appears to have been a tenant partly of my father's and partly of my cousin, Mr. Barton, of Grove, near Fethard. My father's property was sold twenty or thirty years ago, and I never had any interest, direct or indirect, in it. I never heard of these parties. But I thought it right to mention the matter when I heard the will read, and the name of the landlord mentioned. The parties, however, did not think that this afforded any reason for my not hearing the case. I think that the construction of the will is very doubtful; and I recognize the force and attractiveness of Mr. Matheson's argument. I proceed mainly upon the use by the testator of certain expressions which have a well-known technical meaning. The litigation has arisen from the ambiguous character of the words used by the testator, and all parties should have their costs out of the estate.

W. M'G.

Appeal.

Nov. 6, 8, 19.

The plaintiff appealed (1).

Matheson, K.C., Ronan, K.C., Moriarty, K.C., and A. V. Matheson, for the appellant.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-GIBBON and HOLMES, L.JJ.

Chaytor, K.C., and Corvan, for the defendant.

Appeal.
1907.

THE COURT OF APPEAL affirmed the order of Barton, J., and dismissed the appeal with costs.

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Solicitor for the plaintiff: *James G. Skinner.*

Nov. 19.

Solicitor for the defendant: *D. J. Higgins.*

R. ST. J. C.

BERNARD, LANDLORD; MOORE, TENANT (1).

Appeal.
1908.

Redemption of Rent (Ireland) Act—“ Full agricultural rent ”—Mode of estimating—Buildings and other improvements—Tithe rentcharge.

Nov. 25.

The principle of *Mairs v. Lecky* ([1905] 2 I. R. 475) applies to long terms of years.

In ascertaining whether a reserved rent is a full agricultural rent on an application under the Redemption of Rent (Ireland) Act, the Land Commission is not bound to act on the assumption that all improvements on the holding were made or acquired by the landlord, and ought to take into consideration any tithe rentcharge payable by the tenant.

THE tenant, who held under a lease dated September 14th, 1775, for a term of 8900 years, at a yearly rent of £75 16s. Irish, equivalent to £69 present currency, served an originating notice under the Redemption of Rent Act, 1881, to redeem the rent and for an advance for the purpose, or in the alternative to have a fair rent fixed. A Sub-Commission dismissed the application, being of opinion that the lands were not let at a full agricultural rent. This was on the basis that the buildings and other improvements had been made or acquired by the landlord, and that tithe rentcharges amounting to £10 10s. payable by the lessee were not to be taken into consideration. The lessee appealed, and the case came before Dodd, J., who instructed his assessor to report. He reported that the gross letting value, exclusive of buildings, was £73 2s. 7d., that the annual value of the buildings was £12, that

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

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1908.
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Tenant.

exceeding the rent reserved by the lease, even if the tithe rent-charges were deducted. He was of opinion that the fair rent would be £59 13s. 9d. *Wynne, Grantor; Wilson, Grantee* (1) (before Meredith, J.), having been cited on the part of the lessor, Dodd, J., obtained the order of the Court of Appeal in that case, from which it appeared that in the opinion of the Court of Appeal the question of the mode of ascertaining what was a full agricultural rent did not arise there (2). In the present case it was admitted that all improvements, including the buildings, were made by the tenant. Under these circumstances Dodd, J., stated a case, setting out the foregoing facts for the opinion of the Court of Appeal, submitting the following questions:—

1. Was I bound to act on the principle that the full agricultural rent was equivalent to the annual sum which should be the fair rent of the holding, on the assumption that all improvements thereon were made or acquired by the landlord?

2. Was I bound to take into consideration, or ought I to have taken into consideration, the tithe rentcharges as an element to be considered in arriving at a full agricultural rent?

Hennessy, K.C., and *W. Q. Murphy*, for the tenant:—

The Sub-Commission followed *Wynne v. Wilson* (1); but that case, so far as it is inconsistent with *Mairs v. Lecky* (3), cannot be relied on. *Mairs v. Lecky* (3) was the case of a fee-farm grant, but it applies to a long term such as we have here. In estimating the full agricultural rent, the tithe rentcharge must be deducted: *Shiel v. Irwin* (4); *Irish Land Commission v. Brown* (5). The principle on which the full agricultural rent is to be ascertained is laid down in *Mairs v. Lecky* (3), and has never since been questioned.

There was no appearance for the landlord.

(1) 35 Ir. L. T. R. 152; 1 New Ir. Jur. Rep. 95.

(2) The order contains the following recital:—"It appears to the Court upon the facts stated that the holding is not one to which the Redemption of Kent (Ireland) Act applies, and the

Court is therefore of opinion that the mode of ascertaining the full agricultural rent thereof does not arise."

(3) [1895] 2 I. R. 475.

(4) 37 Ir. L. T. R. 92.

(5) 36 Ir. L. T. R. 226.

THE LORD CHANCELLOR :—

We answer the first question “No.” *Mairs v. Lecky* (1) rules this case in favour of the tenant. We answer the second question “Yes.”

Appeal.
1908.

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Landlord;
MOORE,
Tenant.

FITZ GIBBON, L.J. :—

It appears to me that, both in ascertaining the “full agricultural rent” for the purpose of deciding whether a holding is within the Redemption of Rent Act, 1891, and in fixing a “fair rent” under the Act of 1881, the interests of the landlord and tenant, respectively, must be considered. *Mairs v. Lecky* (1) decided that, in fixing a fair rent, a fee-farm grantee is entitled to be exempted from rent in respect of permanent improvements, *i.e.* buildings and reclamation of waste lands; and at pp. 489, 490, I expressed my opinion that, by making such improvements, a tenant does not increase the landlord’s interest, though he creates additional security for the rent. I also put a case, giving figures, for illustration only, to show that the effect of including the value of permanent improvements in the “agricultural rent” might be to prevent the grantee from getting his rent reduced at all, though the value of the thing originally demised had fallen greatly, and the landlord had added nothing to it. The “fair rent” would remain the same, though the tenant had added value to the “holding” at his own expense to an amount equal to the depreciation of the landlord’s interest.

It would be strange if “the full agricultural rent,” on which the right of redemption depends, ought to be ascertained on a basis so different from that on which “the fair rent” would be afterwards fixed, that the right of redemption would be excluded because the tenant’s improvements were valuable. I think that *Mairs v. Lecky* (1) decided that this is not so.

In arriving at a “full agricultural rent,” or at a “fair rent,” the liability of the holding to tithe rentcharge must be taken into consideration. The tithe rentcharge belongs neither to the landlord nor to the tenant, but it is practically a charge upon

(1) [1905] 2 I. R. 475.

Appeal.
1908.

BERNARD,
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MOORE,
Tenant.

Fitz Gibbon,
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both, or a deduction from the value of the interests of both, and the rent to be paid to the landlord for his interest, therefore, cannot include it.

I am not certain that I understand the second question about tithe rentcharge, as it is put ; but as my colleagues have no doubt about the way in which it should be answered, I do not differ from them.

HOLMES, L.J., concurred.

Solicitor for the tenant : *Wallis*.

W. G.

IN THE MATTER OF THE ESTATES OF ARTHUR FITZ-
MAURICE AND FREDERICK R. ARMITAGE.

Wylie, J.
1909.

Feb. 9, 11,
15.

Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56), sect. 1 (3)—Tenanted land—Lands in occupation of grantee under a fee-farm grant—Lands formerly evicted for non-payment of rent in occupation of grantee.

Where the grantee in a fee-farm grant made in 1890 had sublet portion of the lands therein comprised, but had since the date of the grant been in occupation of the remaining portion:—

Held, that the latter was “tenanted land” within the meaning of sect. 1 (3) of the Evicted Tenants (Ireland) Act, 1907.

Where the grantee in a fee-farm grant made in 1857, pursuant to the provisions of the Renewable Leasehold Conversion Act, had sublet portion of the lands therein comprised to a number of tenants, had evicted one for non-payment of rent prior to 1903, and had himself gone into occupation of the evicted holding:—

Held, that the latter was not “tenanted land” within the meaning of sect. 1 (3) of the said Act.

QUESTIONS OF LAW submitted by the Estates Commissioners for the opinion of the Judicial Commissioner.

In Fitzmaurice’s estate, the following facts appeared from the memorandum of the Estates Commissioners.

On the 24th July, 1908, the Estates Commissioners published in the *Dublin Gazette* a notice, stating that they proposed to acquire compulsorily under the Evicted Tenants (Ir.) Act, 1907, part of the lands of Killedmond, containing 144A. 1R. 18P., in the Barony of Idrone east, County of Carlow. On the 19th December, 1908, the Estates Commissioners made an offer to the said Arthur Fitzmaurice, and on the 16th January the said Arthur Fitzmaurice presented his petition, praying that the lands should not be acquired without further inquiry. The lands proposed to be acquired compulsorily were held by the said Arthur Fitzmaurice along with other lands under a fee-farm grant, dated the 19th September, 1890. The other parts of the said lands, held along with the lands proposed to be acquired compulsorily

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under the said fee-farm grant, were in the hands of tenants holding under the said Arthur Fitzmaurice. The lands proposed to be acquired compulsorily were in the occupation of the said Arthur Fitzmaurice.

The following question was submitted:—Were the lands proposed to be acquired “tenanted lands” within the meaning of the said term in section 1 (3) of the Evicted Tenants (Ir.) Act, 1907, and were the Estates Commissioners debarred from acquiring the said lands accordingly?

In Armitage’s estate the following facts appeared:—On the 23rd of June, 1908, the Estates Commissioners published a notice in the *Dublin Gazette*, stating that they proposed to acquire compulsorily under the Evicted Tenants (Ir.) Act, 1907, part of the lands of Knockforlagh, containing 49A. 2R. 4P., in the Barony of Slievardagh, County Tipperary.

On the 18th November, 1908, the Estates Commissioners made an offer to the said Frederick R. Armitage; and on the 11th December, 1908, the said Frederick R. Armitage presented his petition, praying that the lands should not be acquired without further inquiry. The entire townland of Knockforlagh, including the lands proposed to be acquired compulsorily, were held by the said Frederick R. Armitage under a fee-farm grant, dated 12th May, 1857, made in pursuance of the Renewable Leasehold Conversion Act. Parts of the said lands of Knockforlagh were in the hands of tenants holding under the said Frederick R. Armitage; and he had entered into agreements with them for the sale of their holdings under the Act of 1903. The remainder of the townland, including the portion proposed to be acquired compulsorily, was in the occupation of the said Frederick R. Armitage.

From the petition it appeared that the lands proposed to be acquired compulsorily were previously held by Michael Martley, as tenant from year to year from the predecessor in title of the said Frederick R. Armitage, at the rent of £19 4s. In 1893 the said Michael Martley was evicted for non-payment of the sum of £57 12s., arrears of rent due up to the 1st May, 1896, but no attempt had been made to redeem. Since possession had been recovered, the lands had remained upon the hands of the prede-

cessor in title of the said Frederick R. Armitage, or of the said Frederick R. Armitage, who had farmed same in conjunction with an adjoining home farm.

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The following question was submitted :—Were the lands proposed to be acquired “tenanted lands” within the meaning of the said term in section 1 (3) of the Evicted Tenants (Ir.) Act, 1907, and were the Estates Commissioners debarred from acquiring the said lands?

Both cases were heard together.

Matheson, K.C., and *John Leech*, for Arthur Fitzmaurice :—

The case is covered by *Young's Estate* (I). [They also referred to sect. 20 of the Evicted Tenants Act, sect. 98 of the Irish Land Act, 1903, and sect. 26 of the Land Purchase (Ireland) Act, 1885.]

Jefferson, K.C., for Frederick R. Armitage :—

We are not a new tenant, because we resumed possession as grantee under the fee-farm grant. We are now in occupation as tenant under the grant. [In addition to *Young's Estate* (1) he also cited *Clanricarde's Estate* (2).]

WYLIE, J.:—

Feb. 15.

In *Young's Estate* (1) the Estates Commissioners submitted to me the question :—Whether land in the occupation of a fee-farm grantee was “tenanted land” within the meaning of the 3rd subsection of section 1 of the Evicted Tenants Act? My answer was in the affirmative. On the facts in that case I was bound to assume, and did assume, that the fee-farm grant created the relation of landlord and tenant between the grantor and grantee, and that the entire land comprised in the grant was, and always had been, in the occupation of the grantee as such tenant. The same question has again been submitted to me in these two cases under a somewhat different state of facts.

In Fitzmaurice's estate the lands proposed to be acquired compulsorily are held by Arthur Fitzmaurice, along with other lands,

(1) 42 I. L. T. R. 13.

(2) [1908] 1 I. R. 423.

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under a fee-farm grant, dated the 19th September, 1890, such other lands being in the occupation of tenants holding under the said Arthur Fitzmaurice, the grantee himself being, and having always been since the grant, in the occupation of the lands proposed to be acquired. It appears from the grant itself that it created the relation of landlord and tenant between the grantor and grantee, and that the grantee was in occupation as tenant prior to and at the time of the grant.

In Armitage's estate the lands proposed to be acquired compulsorily are held, with the rest of the townland of Knockforlagh, by Frederick Armitage under a fee-farm grant dated the 12th May, 1857, made in pursuance of the Renewable Leasehold Conversion Act. It therefore continued the relation of landlord and tenant between the grantor and grantee. The entire lands, save the demesne portion, had been sublet to tenants prior to 1896. In that year Michael Martley, who had been previously tenant from year to year of the lands proposed to be acquired compulsorily, was evicted for non-payment of rent, and his holding has since then been in the occupation of his landlord, the rest of the land comprised in the fee-farm grant, save the demesne, being still in the occupation of the other tenants.

The question, therefore, I have really to decide is this:—Whether my decision in *Young's Estate* (1) applies to either or both of these cases.

Now, by section 26 of the Act of 1885, "tenant," within the meaning of the Land Purchase Acts, includes a tenant holding under a fee-farm grant, and therefore it seems to me to follow, that, where a fee-farm grant creates the relation of landlord and tenant between the grantor and grantee, if the grantee occupies the land comprised in the grant as grantee under it, it is "tenanted land" within the meaning of the Land Purchase Acts. That "tenanted land" has the same meaning in the Evicted Tenants Act, I think there can be no doubt, having regard to sect. 20 of that Act, and so I held in *Young's Estate* (1).

Now, does it make any difference if the grantee has let part of the land to one or more tenants? Does the rest of the land

(1) 42 I. L. T. R. 13.

which remains in his own occupation cease to be tenanted land by reason of that sub-letting? I cannot conceive on what ground it could be so held, and, therefore, I answer the question in Fitzmaurice's case in accordance with my decision in *Young's Estate* (1).

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The further question still remains, Does it make any difference, if the grantee has sublet part of the lands comprised in the grant to a number of tenants, has evicted one for non-payment of rent, and has himself gone into occupation of the evicted holding? This appears to me to raise a very nice and difficult question—and, before answering it, I think it is necessary to examine carefully some of the provisions of the Evicted Tenants Act.

Now, it appears from section 1, sub-sect. 2, that the purpose of the Act was the provision of parcels of land for certain evicted tenants who were evicted from their holdings prior to the passing of the Act of 1903, and that “new tenant” means a tenant of a holding formerly occupied by an evicted tenant. Sub-sect. 3 then provides that no tenanted land shall be acquired compulsorily, unless it is in the occupation of a “new tenant,” *i.e.*, unless it is in the occupation of a person who is “tenant of a holding formerly occupied by an evicted tenant.” Now, if the land sought to be acquired in this case is “tenanted land,” if Frederick Armitage is now in occupation of this land *as tenant*, he must be a “new tenant,” because he would be tenant of a holding formerly occupied by an evicted tenant. From whom does he hold this new tenancy? It cannot be from the grantor of the fee-farm grant, for he is still tenant under the grant of the entire land comprised therein. His position as such tenant under the grant is entirely unaffected by the subletting and eviction of any part of the land. The only other person from whom he could hold this “new tenancy” would be himself, which, of course, is an absurdity.

We are forced, therefore, to consider whether there is not some reasonable construction of the Act by which this absurdity may be avoided. Now, under the Land Purchase Acts, the word “holding” has a clearly defined meaning—“Holding during the

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continuance of a tenancy means a parcel of land held by a tenant of the landlord for the same term and under the same contract of tenancy, and upon the determination of such tenancy means the same parcel of land discharged from the tenancy." But it seems to me to be clear, from sub-sects. 2 and 3 of sect. 1 of the Evicted Tenants Act, that the parcels of land formerly occupied by the evicted tenants are still, in contemplation, and for the purposes, of the Act, to be regarded as "holdings," and not only as "holdings," but as the holdings of their respective evicted tenants. And no matter whether these "holdings" have since the eviction been mixed up with other land, or dealt with as distinct and separate parcels of land, it seems to me that the Act intended to confer on the Estates Commissioners power to acquire compulsorily all such holdings where they had not been relet to *bona fide* tenant farmers, provided they were required for the reinstatement of the evicted tenants and subject to the restrictions in sect. 7.

Now, regarding the parcel of land sought to be acquired in this case as the "holding" of the evicted tenant, Armitage went into occupation of it, not as *tenant* under the fee-farm grant, but as landlord of the evicted tenant and subject to the equity of redemption of the evicted tenant. As a mere parcel of land Armitage's title to it is, no doubt, as tenant under the fee-farm grant, the same as his title to the rest of the land comprised in the grant which is still sublet, but as a "holding" or as the "holding" from which his tenant was evicted he does not occupy it as *tenant* under the grant, but as landlord. His only "holding" under the grant is the entire land comprised in the grant.

Therefore it appears to me that this "holding," in the view and for the purposes of the Evicted Tenants Act, is not tenanted land, and I answer the question in Armitage's case in the negative.

Solicitor for Arthur Fitzmaurice : *E. C. Jameson.*

Solicitor for Frederick R. Armitage : *A. H. Morgan.*

J. E. W.

SIMMONS v. MONTAGUE.

(1904. No. 700.)

M. R.

1907.

March 12.

Equitable mortgage—Deposit of title-deeds and map—Sale by Court—Mistake—Premises described on map not included in title-deeds—Agreement to charge all the interest of the mortgagor implied.

The owner of a hotel deposited with a Bank, by way of equitable mortgage without writing, the title-deeds and a map of the hotel premises. The Bank transferred the equitable mortgage to S. by deed. The premises comprised in the deeds were sold by order of the Court in a suit brought by S. to raise the amount of the mortgage. On investigation of the title it appeared that part of the premises delineated on the map was not comprised in the deeds, and that the mortgagor had only a possessory title to it.

The Court held that there was an agreement by the mortgagor, evidenced by the documents, including the map, to charge all his interest in the hotel premises, the benefit of which passed to S., and, the purchaser being willing to take the part not comprised in the deeds without title, declared that that part was to be deemed included in the equitable mortgage, and directed a conveyance of the entire premises to be made to the purchaser.

SUMMONS.

This was an application on behalf of the plaintiff to have an order for sale of July 27th, 1904, amended by reason of the following circumstances:—

The defendant, Joseph Montague, was the owner of a hotel in the town of Dungannon, and county of Tyrone, known as the Commercial Hotel. On or about February 9th, 1893, he deposited certain title-deeds and documents, including a map, with the Belfast Banking Company, Limited, by way of equitable mortgage to secure to the Bank all such sums as the Bank might advance to him on his current account, or might otherwise accrue due to them. There was no agreement in writing between the parties as to the equitable mortgage. The deeds and documents deposited with the Bank were as follows:—(1) Original conveyance, dated July 24th, 1858, from the Commissioners for the Sale of Incumbered Estates in Ireland to Michael Montague; (2) original

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deed of exchange and covenant, dated August 15th, 1872, The Right Honorable Thomas Granville Henry Stewart, Earl of Ranfurly, with Michael Montague; (3) copy lease of house and premises in 8 Market Square, Dungannon, dated December 9th, 1842, Letford McClelland to the Earl of Ranfurly; (4) copy letters of administration of the goods of Michael Montague, deceased, granted January 22nd, 1892, to Margaret Kelly; (5) map of premises in Market Square, Dungannon, in *Montague v. Montague*; (6) search against Michael Montague and another; (7) fire policy for £1800 in Sun Insurance Office, Number 554,365; and (8) fire policy for £200 in Sun Insurance Office, Number 552,385.

By indenture, dated January 14th, 1897, and made between the Bank of the first part, the defendant, Joseph Montague, of the second part, and the plaintiff, John Simmons, a solicitor practising in the town of Dungannon, of the third part, after reciting that the said Joseph Montague on February 9th, 1893, deposited by verbal agreement with the Bank the title-deeds, evidences, and writings contained in the first schedule thereto annexed, relating to the hereditaments and premises in the second schedule thereto annexed, and that the sum of £473 2s. 2d. was due to the Bank on foot of the said equitable mortgage, the Bank, in consideration of the sum of £473 2s. 2d. paid to them by the plaintiff, as mortgagees assigned to the plaintiff the said sum of £473 2s. 2d. due to them on foot of the said equitable mortgage, together with the title-deeds, evidences, and writings mentioned in the first schedule to the said indenture, and all benefits arising from the said deposit, and all rights and benefits in relation thereto, but subject to such right or equity of redemption as existed in respect of the same. The deed contained a covenant by the said Joseph Montague to pay to the plaintiff the said sum of £473 2s. 2d., together with interest thereon half-yearly at the rate of 5½ per cent. per annum.

On the 19th July, 1904, the plaintiff instituted the present proceedings by summons, to have it declared that he was entitled to a charge of £473 2s. 2d., and £117 1s. 10d. interest thereon, on the lands and premises situate in Market Square and Thomas Street, in the town of Dungannon, known as the Com-

mercial Hotel, and for a sale or receiver to raise the amount of such charge.

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By order of the 27th July, 1904, it was declared that the sum secured by the said equitable mortgage, and the interest thereon, were well charged on the defendant's interest in the lands and premises set forth in the schedule thereto annexed, amounting to the sum of £590 4s. for principal and interest, with further interest and costs, and by the said order the said premises were ordered to be sold in default of payment as therein. The lands and premises were described in the schedule as follows:—

“All that tenement in Castle Street in the town of Dungannon and County of Tyrone, described as containing in the front 23 feet, and in the rear backwards 300 feet, as the same was formerly divided between Robert Johnston and James Leaford, bounded on the east by a tenement formerly in the possession of Dr. Kennedy, and on the west by a tenement formerly in the possession of James Green, with the appurtenances. All that and those the plots and parcels of ground whereon the following premises are erected, viz., a house used as a spirit store in the occupation of the said Michael Montague, containing in front to the common passage and yard leading from Thomas Street to Market Square and at the rear thereof 29 feet, and extending from front to rear 17 feet 2 inches, and a block of buildings facing Thomas Street aforesaid (formerly consisting of flax stores in the occupation of Thomas Hurson, John M'Crystal, and Joseph M'Gladrigan), a portion of which was then used as a stable by the said Michael Montague, and another portion of which was used as a house for the fire engine, extending in front along Thomas Street aforesaid, 69 feet 9 inches, and extending from front to rear, at the north end thereof 15 feet, and at the south end thereof 21 feet, be all the said admeasurements more or less, together with the exclusive use of the yard or passage immediately in rear thereof, all which said premises are situate in Thomas Street, and in the rear of Market Square, in the town and barony of Dungannon and County of Tyrone.”

These parcels were taken from the said deed-poll and the said deed of exchange.

The premises were put up for sale pursuant to the said order

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on August 31st, 1905, under particulars and conditions of sale settled by the Court, and were purchased for £1000 by Peter M'Aleer, the occupier of the premises, who held them for a term of years which expired in August, 1904. The particulars stated that the premises were held (1) under the said deed-poll of July 24th, 1858; and (2) under a lease of December 9th, 1842, from Letford M'Clelland to Lord Ranfurly (being the lease copy of which had been deposited), whereby the premises with others were demised to Lord Ranfurly, for three lives, with a covenant for perpetual renewal, subject to the yearly rent of £32, but indemnified by said deed of exchange against payment of the said rent by the remainder of the premises comprised in the said lease, and set out the parcels contained in the said deed-poll and in the said deed of exchange, as above stated in the schedule to the said order. The descriptive particulars stated that the above premises were situated in Market Square (formerly Castle Street), Dungannon, in the county of Tyrone, and comprised the premises well known as Montague's Commercial Hotel, in which the late Mr. Michael Montague carried on for many years a very successful business in hotel, bar, posting, and undertaking. After describing the hotel came this statement—"The yard is commodious, having stabling for twenty horses, car-shed, harness-room, corn-lofts over stable, byre, and piggery, with a very large hay-shed adjoining. A small building behind the bar, formerly used as a bagatelle-room, with ground-floor underneath, also a portion of the yard containing 55 feet by 11 feet, respectively, marked on map of the premises 'A' and 'B,' are not included in the premises for sale, as not being held under the same title."

The purchaser by his requisitions objected that portions of the premises delineated on the map (on which the hotel premises, offices, and yard were coloured yellow), which was deposited with the title-deeds, were not included in the title-deeds, namely, premises extending from the north side of the premises marked "B" on the deposited map along Thomas Street to the boundary of the said hotel premises marked "B" on the north side thereof, consisting of a gateway, offices, and part hay-shed, also a strip of ground along the rear of the premises marked "B," and a small plot on the south side of the premises coloured red on the said map,

facing Thomas Street and lying between the premises coloured red and the premises coloured green, consisting of an office, house, and gateway.

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On inquiry made by the plaintiff, this turned out to be the case, and it could not be ascertained under what title these portions had been acquired by the defendant. It was stated, however, that he and his father before him occupied these portions for over twenty-five years without any claim having been made or rent paid, and it also appeared that the purchaser had been in possession of the whole premises as tenant for over ten years, and was aware that no claim had been made.

On February 27th, 1907, the plaintiff applied by summons to the Master of the Rolls to amend the order for sale of July 27th, 1904, by including in it the portions of the premises delineated on the map which were not included in the title-deeds. The application was supported by an affidavit of the plaintiff stating the above facts, and submitting that the deposited map had been deposited by the defendant with the bank with the intention of charging all the premises delineated thereon, including the portions not comprised in the said title-deeds, by way of equitable mortgage to secure to the bank such advances as they might make to the defendant. The summons came on for hearing on March 12, 1907.

Oulton, K.C., for the plaintiff:—

The defendant when he deposited the map along with the title-deeds represented to the bank that all the premises described on the map were included in the title-deeds. He has a statutory title to the premises which were not included in the title-deeds, and should make good his representation and convey them to the purchaser. There is no person having a prior charge on these premises who would be prejudiced. [He referred to *Ex parte Bisdee* (1); *Pryce v. Bury* (2); *Jones v. Williams* (3); *In re Boulter* (4); *Fisher on Mortgages* (5th ed.), s. 35.]

Jonathan Pim, for the purchaser:—

Everyone thought that all the premises coloured yellow on the

(1) 1 M. D. & De G. 333.

(3) 24 Beav. 47.

(2) 2 Dr. 11.

(4) 4 Ch. D. 241.

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map were included in the sale. The descriptive particulars referred to premises which are on the map, but not included in the deeds. No information can be obtained as to how Montague or his predecessor in title got these premises. They were known as part of the hotel premises. The deposit of the map was clear evidence of intention and representation on the part of the defendant. He, in effect, said to the bank, when he brought in the deeds and map: "These are my premises." The purchaser is a willing purchaser, and is satisfied to take whatever title the defendant can give. The sale can be carried out if the order of July 27th, 1904, is amended by including in it all the lands coloured yellow.

George Green, for the defendant:—

I do not admit that the defendant made any such representation as is suggested. The question cannot be settled by deciding that these premises were included in the deposit. The deposit of a map cannot create an equitable mortgage of the premises described in it: *Goodwin v. Waghorn* (1), where the deposit of a receipt for purchase-money describing the property (there having been no conveyance), and a plan attached, were held to give an equitable mortgage on the property. The defendant lives in America, but he is willing to give to the purchaser everything he is entitled to, but alleges that the hay-shed is his. The title was investigated by the Court counsel.

Oulton, K.C., in reply:—

The particulars included the hay-shed.

Jonathan Pim [in reply to the Master of the Rolls]:—

The purchaser will give an undertaking to take the premises not included in the deeds without any further proof of title.

THE MASTER OF THE ROLLS:—

I am of opinion that the contention of Mr. Oulton is correct, and that the premises mentioned in the requisitions on title, though not included in any of the documents of title deposited with the Bank, must be taken to have been included in what I

may call the agreement by Joseph Montague to execute a mortgage to the Bank of the hotel premises, offices, and yard. The premises in dispute, according to Mr. Simmons' affidavit, have been held for a great number of years as part of the hotel premises. No one except the owner and occupier of the hotel premises has made any claim in respect thereof for twenty-five years; no rent has been paid during that period, and it would appear that the owner of the premises comprised in the deeds had acquired a possessory title to the hay-shed and the other portions of the yard and premises mentioned in Mr. Simmons' affidavit. That being the state of the case, Joseph Montague came to the Bank to borrow money from them. It appears that in addition to the title-deeds he deposited with them a map, which had been used in some litigation in the year 1893. I have before me the original map, which is verified by affidavit. It is entitled "*Montague v. Montague*," and was made by a civil engineer, Mr. J. C. M'Bride of Armagh, a careful and competent surveyor, in whose accuracy I have every reason to place confidence. On this map the premises coloured yellow are called "The hotel premises, offices, and yard"—that is the description. On this map, as I understand the evidence, are contained all the premises the subject of Mr. Pim's requisitions. I have nothing to do with the portion coloured red, which is included in the title-deeds, nor with the portion coloured green, as to which no question arises. I entertain no doubt that the agreement by the defendant, Joseph Montague, to execute a mortgage to the Bank was an agreement by which he would have been obliged to give as security, not only the portion of the hotel premises included in the deeds, but also the portion of them which he was in possession of. What is the operation of an equitable mortgage by deposit of title-deeds? I think that it cannot be better described than in the judgment of Lord Chancellor Ball in *M'Kay v. M'Nally* (1), which was a case as to an alleged breach of a covenant in a lease not to mortgage or assign, and the question was whether an equitable mortgage by deposit of title-deeds was a breach of such a covenant. Ball, C., says, at page 444:—"Then is the word 'mortgage'

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(1) 4 L. R. Ir. 438.

M. R. in this covenant used in a sense that includes an equitable mortgage by deposit of title-deeds? To answer this question, we must ascertain the nature and character of such a mortgage. I
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 MONTAGUE. do not know that this is anywhere better stated than by Lord Cottenham in *Parker v. Housefield* (1): 'A deposit of title-deeds has always been considered as an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather as a contract for a mortgage, which, according to the well-known doctrine of Courts of Equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed.' Adopting this statement, which is supported by an examination of the authorities referred to by this most accurate Judge, it appears to me that the deposit of the lease and the accompanying letter amount to, and in my opinion cannot be placed higher than, a specific agreement for a mortgage. But an agreement for a mortgage, although it may, so far as sale for non-payment of the money secured, bring all the consequences of a mortgage, is yet no more a mortgage than an agreement for the assignment of a lease is an assignment."

Palles, C.B., says at p. 450 of the same case:—"What is the effect of that transaction? It passed no legal estate in the demised premises. It was nothing but an agreement, to which effect would have been given in a Court of Equity, that the mortgagee should have a lien upon the lease for certain advances; and, possibly, an agreement that the lessees would, when required, execute a legal mortgage. I think it unnecessary to consider what would have been the exact relief afforded—whether it should necessarily have been confined to a sale, or whether, if the mortgagee preferred, he could have had a decree for the execution of a legal mortgage. What I deem material is, that the whole matter rests in contract; that the action of the Court of Equity would have been founded on the contract."

As I read this case, and those cited by Mr. Oulton, the plaintiff had the option of coming to the Court for a decree for the execution of a legal mortgage, or a sale of the premises, coupled in either

(1) 2 M. & K. 420.

case with a declaration that the equitable mortgage embraced all the premises coloured yellow. A representation more clear there could not be than that made by the deposit of the map, that the premises comprised in it constituted the hotel premises. If the objection had been made by the defendant to such declaration that he had possession of, but could not make title to, the premises, he would not be listened to for a moment, if the equitable mortgagee waived the question of title and said, "Give me what you have possession of." This case is not, as Mr. Green suggested, a case of declaration that the mere deposit of a map was a good mortgage, by way of equitable deposit, of the premises shown upon it; it is a finding that, taking the documents as a whole, there was an agreement between the parties evidenced by the documents to execute a mortgage of the hotel premises, including the premises coloured yellow on the map. Mr. Simmons got by the transfer to him whatever the Bank got: the *habendum* in his deed is: "All that the said sum of £473 2s. 2d. so due and owing to them by the said Joseph Montague, as aforesaid, on foot of the said equitable mortgage, together with the title-deeds, evidences, and writings mentioned in the said first schedule hereto, and all benefit arising from the deposit, and all rights and benefits in relation thereto." Joseph Montague, the defendant, was a party to the transfer; and the benefit of it was transferred to Simmons. Simmons brought these proceedings to sell the premises. Unfortunately the matter was not discovered before. The Court has virtually made an order for the sale of the premises in dispute. [THE MASTER OF THE ROLLS read the descriptive particulars (1), to the words, "with a very large hay-shed, adjoining."] The only point in dispute is as to this hay-shed, which the Court has directed to be sold. The answer to Mr. Green's point—What did the purchaser buy?—is that he bought the hotel premises which had been in the possession of the deceased proprietor, Montague. As to Mr. Green's second point, I might have had great difficulty in dealing with it, except for the undertaking given by the purchaser's counsel in Court, to take the premises without any further proof of title. I shall make a declaration that the premises

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coloured yellow were included in the agreement for a mortgage, I shall amend the order for sale by including the other premises, and direct that a conveyance shall be executed of all the estate and interest of the defendant, Joseph Montague, in the premises. The purchaser will get what he intended to buy, and the vendor will convey what he intended to sell; and though the plaintiff, Simmons, has no pecuniary interest in the matter, he has the interest, which every person having carriage of proceedings has, to see that the Court gives to the person buying under the conditions of sale settled by the Court what the vendor intended to sell and the purchaser to buy.

I think that the plaintiff must have his costs of this application. According to my view the Bank were not to blame in believing that the deeds contained all the premises coloured yellow on the map. The plaintiff thought so too, and the whole case proceeded on the basis that they were contained in the deeds. I cannot say that there was any default or negligence on the part of the Bank or of the plaintiff to deprive the latter of the costs of this application, including the costs of a case to counsel to advise what proceedings should be taken. The least expensive course has been taken in the interest of the defendant, as well as that of the other parties.

The following order was made :—

“THE JUDGE doth declare that those portions of the premises sold in this action, which the purchaser alleges by his requisitions on title not to be included in the plaintiff's charge in the aforesaid order, dated the 27th day of July, 1904, mentioned (being such portions of the premises coloured yellow and green on the map, exhibit marked ‘G’ in the aforesaid affidavit of the plaintiff referred to, as are not included in the conveyance dated the 24th day of July, 1858, from the Commissioners for the Sale of Incumbered Estates in Ireland to Michael Montague), shall be deemed to have been included in the premises which the said defendant, Joseph Montague, mortgaged to the said Belfast Banking Company, Ltd., by means of deposit of certain title-deeds, evidences, and writings, the Judge declaring that said mortgage by way of equitable deposit (transferred to the plaintiff as hereinbefore mentioned) dealt with all the estate and interest of the said Joseph Montague in said premises, the said purchaser, by his counsel, undertaking to accept such title

as has already been shown in respect of that portion of the premises to which a possessory title only can be given; and accordingly the Judge doth declare that the premises coloured yellow, red, and green on the aforesaid map (a copy of which it is intended to attach to the conveyance of the said premises to be executed to the said purchaser), and all and every portion thereof were and are now to be deemed included in the aforesaid charge, now vested in the plaintiff as aforesaid, and under which the said premises have been sold pursuant to the aforesaid order, and that the said conveyance shall operate to transmit all the estate and interest therein of the said Joseph Montague: this order to be read as ancillary, and, so far as necessary, supplemental, to the said order for sale, dated the 27th day of July, 1904; and the Judge doth declare the plaintiff entitled to be paid his costs of and incidental to this application and order, with counsel, and proceedings thereunder, as part of his costs in this action in the same priority with his demand, said costs to include the case submitted to counsel, now produced, and marked 'A'; and the Judge doth declare the said defendant, Joseph Montague, entitled to his costs of and incidental to this application and order, with counsel, as part of his costs in this action, to be paid out of such funds, if any, as may become properly applicable thereto; the said purchaser to abide his own costs thereof."

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Solicitors for the plaintiff: *R. Simmons & Co.*

Solicitor for the defendant, Joseph Montague: *James Mullan.*

Solicitor for the purchaser: *R. Barry Meglaughlin.*

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Nov. 30.
Dec. 1.

ROWE v. GOUGH AND OTHERS.

GOUGH v. BOLTON (1).

Landed Estates Court—Lands comprised in absolute order for sale, subject to contingent jointure—Portion of lands sold subject thereto, but indemnified by other portion not then sold—Subsequent sale of the other portion discharged from jointure—Rights of jointress as against prior incumbrancers.

Where lands are conveyed by Landed Estates Court conveyance, subject to an annuity, but indemnified against same by other lands comprised in the absolute order for sale, the indemnity so created must be made effective as against the lands liable thereto, notwithstanding the fact that incumbrancers thereon having priority to the annuity are thereby prejudiced.

In 1879 and 1880 the estate of E. H. R. was put up for sale in the Landed Estates Court in fifty-one lots, under conditions of sale which provided (*inter alia*) that each of lots 1 to 46 would be sold subject to the entire of a jointure rentcharge payable to the wife of the owner for her life, in the event of her surviving him, but indemnified against payment of any part of same by lots 47 to 51, which would be sold by the Court primarily liable to bear the same in certain proportions. Twenty-nine lots were sold at the time, and were conveyed to the respective purchasers, in accordance with the above condition. E. H. R. died in 1896, leaving his wife him surviving. In 1906 proceedings for the sale of the lands comprised in the remaining lots, including the indemnifying lots, under the Land Purchase Acts, were commenced, but the estimated purchase-money was insufficient to discharge the incumbrances having priority to the jointress. In 1907, the jointure being in arrear, the jointress instituted the action of *Rowe v. Gough and Others* in the Chancery Division to raise her jointure, naming the purchasers of lots 1 to 29 as defendants. Thereupon, in *Rowe's Estate* ([1907] 1 I.R. 380), on the application of the purchasers, Ross, J., being of opinion that the purchasers, by their conveyances, obtained a charge by way of indemnity on lots 47 to 51 in priority to the incumbrancers, made an order directing the receiver to apply the rents and profits of lots 47 to 51 in relief of the indemnified purchasers. On appeal from this order, the Court of Appeal, being of opinion that no money would be payable in respect of the jointure, or any indemnity provided in respect of it, out of any of the lands subject to the said jointure, until it

(1) Before THE LORD CHANCELLOR (LORD LOREBURN), and LORDS ASHBOURNE and MACNAGHTEN.

was seen by the result of the sale of the estate what moneys (if any) were properly applicable to meet the said jointure, and any arrears thereof, after providing for prior incumbrances, discharged the order of Ross, J. ([1907] 1 I.R. 388). The defendants in *Rowe v. Gough and Others*, who had admitted liability, thereupon obtained leave to amend their defence in accordance with the terms of the order of the Court of Appeal, and, on the hearing of the action, Kenny, J., made an order declaring the jointure well charged, and directing certain inquiries, but refused to appoint a receiver or direct the sale of the lands, and declared his order to be without prejudice to such rights as the order of the Court of Appeal declared to exist in favour of unpaid incumbrancers in *Rowe's Estate* ([1908] 1 I. R. 402). The jointress appealed from the latter part of the order, but the Court of Appeal held that the appeal could not be allowed consistently with their former order ([1908] 1 I. R. 411).

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On appeal to the House of Lords :—

(1) The order of the Court of Appeal in *Rowe v. Gough and Others* was reversed, and the order of Kenny, J., was varied by discharging the latter part of the order, and by making an order for the appointment of a receiver over the rents and profits of the lands, for the purpose of discharging the jointure ; and (2) the order of the Court of Appeal in *Rowe's Estate* was reversed, and the order of Ross, J., was restored.

ROWE v. GOUGH AND OTHERS.

APPEAL by Annette Letitia E. Rowe from an order of the Court of Appeal, dated the 18th May, 1908, affirming the judgment of Kenny, J., dated the 31st January, 1908, so far as the same declared that the Court did not at present make any order for a receiver over the rents and profits of the lands and hereditaments comprised in the Landed Estates Court Conveyances therein mentioned, or for a sale in default of payment of what may be found to be due on foot of the rentcharge on the taking of the account by the said judgment directed, and so far as the same declared that the said judgment was without prejudice to such rights as the order of the Court of Appeal, dated the 27th June, 1907, in the matter of the estate of Ebenezer H. Rowe, declared to exist in favour of unpaid incumbrancers in the said matter, and so far as the same ordered that such unpaid incumbrancers should receive notice of any application for a receiver, or sale, or for allocation of funds on payment by a receiver in this action, and so far as the same ordered that no proceedings under the said judgment be taken for a period of three months from the date of the said judgment. The facts of the case, and the judgments of the Court of Appeal,

H. L. and of Kenny, J. (sitting for the Master of the Rolls), have already
 1908. been fully reported (1).

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Serjeant O'Connor, K.C., Ronan, K.C., and John Leech, for the appellant, Annette Letitia E. Rowe, the jointress.

Matheson, K.C., D. F. Browne, K.C., James O'Connor, K.C., and J. E. Walsh, for the respondents Michael Gough and others.

At the conclusion of the arguments the following appeal and cross-appeal were heard.

GOUGH *v.* BOLTON.

This was an appeal by Michael Gough, M. Browne, W. Harpur, A. Kelly, A. Harpur, P. Dahn, E. A. Gibbon, A. Wheelock, M. Walsh, M. A. Ford, J. Pierce, and B. J. O'Flaherty, from the order of the Court of Appeal, dated the 27th June, 1907, made in *In re Rowe's Estate* (2), which said order was in the following terms:—
"The Court being of opinion that no money will be payable in respect of the said jointure or annuity, or any indemnity provided in respect thereof, out of any of the lands subject to the said jointure or annuity, until it is seen by the result of the sale of the estate in this matter what moneys (if any) are properly applicable to meet the said jointure or annuity, and any arrears thereof, after providing for prior incumbrances, it is ordered that the order of the Land Judge, dated the 18th December, 1906, do stand discharged, . . . and it is ordered that the order of the Land Judge, dated the 17th May, 1907, do stand discharged, but it is ordered that Thomas F. Crozier, who has been authorized by the Land Judge to collect the rents and profits, or interest in lieu of rent, payable out of the said estate, do keep separate accounts of the rents and profits of the indemnifying lots, numbers 47 to 51, and of the application thereof in the order adopted by him heretofore of such rents and profits, or in such other order as may hereafter be adopted."

There was also a cross-appeal by Annette Letitia E. Rowe against the portion of the order printed in italics.

The facts, and the judgments of the Court of Appeal and of Ross, J., have already been fully reported (2).

(1) [1908] 1 I. R. 388, 402.

(2) [1907] 1 I. R. 380, 388.

Matheson, K.C., D. F. Browne, K.C., James O'Connor, K.C., and J. E. Walsh, for Michael Gough and others, appellants, and respondents in the cross-appeal.

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Serjeant O'Connor, K.C., Ronan, K.C., and John Leech, for Annette Letitia E. Rowe, respondent, and appellant in the cross-appeal.

W. M. Jellott, K.C., and W. M. Crozier, for Annie Bolton and Eva Scott, respondents in both appeals, being the incumbrancers claiming priority to the jointure.

LORD LOREBURN, C. (1):—

Dec. 1.

My Lords, in the case of Annette Letitia Elizabeth Rowe, against Michael Gough and others, a strange confusion has led to the defeat of the plaintiff in an absolutely undefended case. Her claim is for arrears of a jointure, and it is not suggested that she is not entitled to recover six years' arrears. No one denies that her charge is good upon the lands sought to be made liable; but it is argued that those lands are entitled to be indemnified by certain other lands which are also subjected to this charge, and that, as there are incumbrances upon those other lands which are prior to the plaintiff's charge thereon, some estoppel arises to prevent her recovering what is due to her from the lands entitled to indemnity.

My Lords, I cannot accept this view. I think in the action, the plaintiff must have judgment in the form that Mr. Justice Kenny directed it, as regards No. 1, "an account of what is due to the plaintiff on the foot of the said rentcharge," which he ordered; No. 2, "an account of all the debts and incumbrances affecting the said lands," which he ordered; and No. 3, "an inquiry as to the respective priorities of all such demands as may be proved"; and beyond that the order of Mr. Justice Kenny must be varied so that there should be an order for the appointment of a receiver over the rents and profits for the purpose of discharging the said annuity.

In regard to the argument that there is an estoppel by judg-

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ment I will only say this much—I see no judgment to the effect that the plaintiff's charge over the lands sought to be made liable in this action is postponed to any other charge. There is an expression of opinion to that effect put as a preface to the operative part of the order made by the Court of Appeal on the 27th June, 1907; but with the utmost respect to the Court of Appeal, I cannot agree with the opinion there expressed, and the counsel for the respondents did not attempt to defend it. It does not seem to me that the Court on that occasion had any jurisdiction to decide that point, even if they had decided it.

Under those circumstances I shall move your Lordships to give the judgment which I have indicated in this case.

LORD ASHBOURNE:—

My Lords, I entirely concur with the judgment of the noble and learned Lord on the woolsack, and in the orders he has indicated he will move.

My Lords, this case, although it has taken a good deal of time for discussion, and has been presented to the attention of your Lordships with great insistence and great clearness, really rests in the narrowest possible compass. There is practically no controversy upon the facts of the case, which are extremely few.

In a deed of conveyance in the Landed Estates Court, made some twenty-five or twenty-six years ago, there was contained a clear indemnity as to the payment of the jointure which has been so often discussed; and the real question in controversy here is, how is that indemnity to be worked out? It is the voice of the Court, the award of the law. It must be given the fullest possible construction: it cannot be lessened; and there is no suggestion that it should be enlarged; and yet I am afraid that unless the decision moved by my noble and learned friend on the woolsack is given effect to, the indemnity would be worth but little.

The jointure created of £300 a year on certain lands in Wexford was contingent, the husband being alive at the time when the conveyances were made in 1881 or 1882; and upon the lands that were sold the jointure was charged equally with

the other lands that were not sold; but for the convenience of the sale, and as a method of carrying out the entire arrangement, which must have presented itself to those having the carriage of the sale and the Judge who was to decide upon the matter, it was arranged that although the jointure was charged upon the sold lands, they should be indemnified by the unsold lands.

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In those times it was probably thought that this was a very solvent estate, and it was not thought that there would be the slightest difficulty in paying all the numerous incumbrances, and paying the jointure as well, whenever it became an actual charge; but time went on, and it turned out that the estate had become of much less value in the market; and at the present time we are told that the incumbrancers on the unsold portion of the property have little chance of getting all their charges, and are therefore careful in looking after all the matters involved.

Under those circumstances, in the events that have happened, the husband having died, the jointress not having been paid for a considerable time, and not knowing exactly what was the position of her rights, acting under the careful advice of those assisting her, made a claim against the sold lands for the payment of her jointure. There was no answer to that. But when the purchasers, who had bought with the benefit of indemnity stated in their conveyances, were informed of the matter, they, of course, had to protect themselves, and then the matter developed in litigation. What was to happen? They naturally sought to make the indemnity which they had got operative and effective. They said, "You cannot go against our lands; we are protected." Remedy was then sought against the unsold lands. The matter went before Mr. Justice Ross; and I may say shortly I agree entirely with his judgment and his orders in reference to the matter.

When, my Lords, the case went to the Court of Appeal in Ireland, the Court was impressed by the fact that if the indemnity were applied in the way contended for, it would reverse and invert the priorities as they existed independently of the indemnity. But, my Lords, one cannot escape from the indemnity. The indemnity is there, and, whatever its effect may be, it must be worked out so as to make it a real and effective indemnity. I

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venture to think myself that is not done by the orders of the Court of Appeal, because it is clear that they felt that it was a hardship—and it is a hardship, in the events as they now are, to tell the incumbrancers, You must submit to a variance of the priorities such as did not at first exist, and you must do that in consequence of the indemnity which has been so much under discussion.

My Lords, I agree, as I said, with Mr. Justice Ross, and I hold that the indemnity must be given full effect to. There is no answer to the case that is made on the part of the jointress against the lands that have been sold. There is no answer that I can see to the claim made by the purchasers of the sold lands, that they are entitled to be indemnified and recouped for all losses that they may sustain in reference to any claim or demand made against them on foot of the jointure. Therefore, my Lords, I concur in the orders indicated by the noble and learned Lord on the woolsack.

LORD MACNAGHTEN :—

My Lords, I quite agree. In the suit of *Rowe v. Gough and Others*, I think the plaintiff is clearly entitled to the order she asks for, as Mr. Serjeant O'Connor has formulated it; and I think she is also entitled to the costs of the suit. Undoubtedly the defendants were placed in a position of very great difficulty by the order of the Court of Appeal; and they adopted—and I do not see how they could have helped adopting—the defence which the Court of Appeal forced upon them; but still, the plaintiff ought not to suffer for that, and I think she is entitled to the costs of the suit as well as the relief she asks for.

With regard to the second case, I need not say very much, but I think Mr. Justice Ross is perfectly right in the orders he made, and I think he is also perfectly right in saying that the Court is bound to keep faith with its purchasers. As I read the conditions of sale which the Court put forward as the terms on which persons were invited to bid, nothing, I think, is clearer than that the indemnity was to be preferentially charged on certain lots. If the 13th condition of sale means what one may infer the Court of Appeal thought it meant, I must say I think it would be one of

the most misleading conditions of sale I ever saw. The reference to sale is not for the purpose of suggesting that the indemnity might be illusory, but merely for the purpose of showing that the Court would take care of the purchasers by seeing that the purchasers of the lots which had to indemnify the others, would be charged with this annuity in exoneration of the other lots, which were to be sold free from it, and for the purpose of showing in what proportions the purchasers of those lots were to be charged with the different portions of the annuity. But the charge upon the lots is perfectly plain; and now under the present Act, seeing that the charge upon the lots is transferred to the purchase-money, I think it must be paid out of the purchase-money. Therefore, my Lords, I entirely agree with the order which the Lord Chancellor has proposed.

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Rowe
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In the case of *Rowe v. Gough and Others.*

Questions put:—

That the order appealed from be reversed.

The Contents have it.

That the judgment of Mr. Justice Kenny of the 31st January, 1909, thereby affirmed, be varied, by discharging so much thereof as declares that the said judgment is without prejudice to such rights as the order of the Court of Appeal dated the 27th June, 1907, in the Matter of the Estate of Ebenezer H. Rowe, owner and petitioner, has declared to exist in favour of unpaid incumbrancers in the said matter, and as orders that such unpaid incumbrancers shall receive notice of any application for a receiver, a sale, or for allocation of funds on payment by a receiver in the action; and by making an order for the appointment of a receiver over the rents and profits of these lands for the purpose of discharging the annuity. The respondents to pay the appellant so much of the arrears as have accrued during the six years before the action.

The Contents have it.

In the case of *Gough and Others v. Bolton and Another.*

Questions put:—

That the order appealed from be reversed.

The Contents have it.

H. L.
1908.

That the order of Mr. Justice Ross be restored.
The Contents have it.

Rowe
v.
Gough.
Gough
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Bolton.

Solicitors for Annette Letitia E. Rowe: *Littledale & Lefroy*,
agents for *Clifford Lloyd*.

Solicitors for Michael Gough and Others: *Nicholson, Patterson,*
& *Freeland*, agents for *P. J. O'Flaherty & Son*.

Solicitors for Annie Bolton and Another: *Lethbridge, Money, &*
Prior, agents for *T. Crozier & Son*.

M. R.
1909.
March 9.

IN RE KELLER.
KELLER *v.* KELLER.

(1905. No. 403.)

Practice—Sale by the Court—Approval fee to solicitor for incumbrancer—
R. S. C., 1891, Ord. LI., R. 4.

When, in an administration suit, property is directed to be sold in lots, the solicitor for an incumbrancer on the property, who is not a party to the suit, is entitled to an approval fee of £2 2s. on each conveyance in which the incumbrancer is required to join. The practice is for the solicitor having carriage of the proceedings to pay the approval fee to the solicitor for the incumbrancer, and to be allowed the same as part of his costs out of the estate.

SUMMONS.

This was an application on behalf of Mary Looney, the party having carriage of the sale of the estate of Peter Keller, deceased, for a direction from the Court, whether the Munster and Leinster Bank, who held a mortgage on several lots of the estate of the deceased, and the title-deeds of which were, by order of May 6th, 1908, lodged in Court, subject to the lien of the said Bank, was entitled to have the draft deeds of assignment of the said lots so mortgaged submitted to their solicitor for approval at the expense of the estate.

The facts of the case were as follows :—

By indenture, dated October 6th, 1898, Peter Keller, of

Macroon, in the county of Cork, mortgaged to the Munster and Leinster Bank, by one deed, several sets of premises held by him under different titles, to secure moneys due to the Bank from time to time.

Peter Keller having died intestate, this suit was brought to administer his estate, and the usual decree for administration was made.

The several sets of premises comprised in the above mortgage-deed were ordered to be sold in lots. On January 28, 1909, Timothy Lucey, the solicitor for Mary Looney, one of the plaintiffs who had carriage of the sale, sent to Michael Purcell, the solicitor for the Munster and Leinster Bank, the draft deeds of lots 1, 2, 4, 5, 7, and 10 (which had been sold to different purchasers by tenders accepted by the Court), for his approval on behalf of the Bank, who were not parties to the proceedings. No approval fees were sent by Timothy Lucey, who stated in his letter that the solicitor for the Bank would have to take his chance of approval fees being allowed to him on taxation. The solicitor for the Bank declined to accept the terms suggested as regards his fees of approval of the six draft deeds, and stated that the Bank, not being party to the proceedings, if the solicitor having carriage or the purchasers required the Bank to execute conveyances, was entitled to have the drafts of such conveyances approved of by its own solicitor, and his fees paid in the usual way. The practice, he added, being that the solicitor having carriage should pay him the approval fees, and that same would, as a matter of course, be allowed him in his costs out of the estate. The solicitor having carriage not assenting to this course, the above summons was taken out by him.

M. R.
1909.

In re
KELLER.
KELLER
v.
KELLER.

Dickie, for the plaintiff Mary Looney.

Norwood, for the Munster and Leinster Bank.

The following authorities were referred to:—*Bradley v. Munton* (1); *Billing v. Webb* (2); *Thomas v. Buxton* (3); *Morgan and Davey on Costs* (2nd ed., 1882), p. 379; *Adair on Costs*, p. 137; R. S. C., 1891, Ord. LI., R. 4.

(1) 16 Beav. 294. (2) 1 De G. & Sm. 716. (3) L. R. 8 Eq. 120.

M. R.
1909.

THE MASTER OF THE ROLLS:—

In re
KELLER.
KELLER
v.
KELLER.

The difficulty has arisen here from the solicitor having carriage of the sale being called upon to pay several guineas as approval fees on the separate conveyances, instead of one fee of two guineas on one conveyance. The vendor—that is to say, the Court—is responsible for that, and the Bank is entitled to an approval fee on each deed, and their solicitor is entitled to receive the ordinary fee in each case. Order LI., Rule 4, deals with sales by the Court, and provides that where an order has been made directing any property to be sold, all proper parties shall join in the sale and conveyance, as the Judge shall direct. I directed the sale to be in lots, and that the Bank should join in the sale and conveyances.

I agree in the statement in Adair on Costs, p. 137, which has been referred to, that, “in the case of sales by the Court, costs of perusal and execution by all necessary parties of the purchase-deed are borne by the vendor.” The Court stands for the vendor here; the draft deeds must be submitted to the necessary parties through their solicitor. The approval fees must be paid to the solicitor for the Bank by the solicitor having carriage, who will have them over against the estate.

Solicitor for the plaintiffs: *Timothy Lucey*.

Solicitor for the Munster and Leinster Bank: *M. Purcell*.

W. L.

IN THE MATTER OF THE ESTATE OF ALLAN B. POLLOK.

Wylie, J.
1909.

*Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48 (3)—
Sale under sect. 6—When agreement for purchase entered into.*

Feb. 23.
March 1.

Where, after preliminary negotiations, the Land Commission, pursuant to the provisions of sect. 6 of the Irish Land Act, 1903, made a formal proposal to purchase an estate at a specified sum, subject to certain clauses and conditions therein mentioned, and (*inter alia*) to the following clause:—"The date of the agreement to purchase shall be the date on which the Land Commission, by order, declare that the statutory conditions and the conditions of this proposal have been fulfilled, and that they agree to purchase the estate at the estimated price"—and the acceptance of the proposal was duly signed by the vendor, and lodged with the Land Commission, but the order of the Land Commission had not yet been made:—

Held, that the above clause was of the nature of an interpretation clause, defining the meaning of the words "date of the agreement" where they occurred in other clauses of the proposal, and that the agreement for purchase of the estate was entered into, within the meaning of section 48 (3), on the date when the acceptance of the proposal was signed by the vendor, or, at latest, when it was lodged with the Land Commission.

QUESTION OF LAW submitted by the Estates Commissioners for the opinion of the Judicial Commissioner, pursuant to sect. 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared, as set out in the judgment of Wylie, J.

After certain preliminary negotiations and proceedings had been carried on, with a view to the purchase of the untenanted portion of this estate, the vendor, on the 28th August, 1906, lodged with the Estates Commissioners an originating request for the sale of both the tenanted and untenanted lands. On the 5th October, 1906, an inquiry was directed by the Commissioners, and on the 15th October, 1907, the Secretary of the Estates Commissioners sent to the solicitors for the vendor the Commissioners' estimate of price for the purchase of the lands comprised in the originating request, subject to certain exclusions therein mentioned, and stating that if, within fourteen days from that date,

Wythe, J.
1909.

In re
POLLOCK'S
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the vendor intimated his willingness to proceed with the sale on the basis of the price named, the Commissioners would take such steps as they might consider necessary with a view to making a formal proposal to purchase in accordance with the provisions of the Act of 1903; and that the estimate was furnished solely for the vendor's information, and was not to be taken as an offer to purchase.

Accordingly, after further negotiations, certain changes and arrangements were made, and on the 28th August, 1908, the Commissioners issued their formal proposal to purchase the estate at £97,389, in the form set out below. Appended to this proposal was a printed form of acceptance in these terms: "I hereby accept the proposal of the Land Commission, dated the 28th August, 1908, to purchase the above estate as in said proposal mentioned, and subject to the terms and conditions of said proposal." On the 30th October, 1908, the vendor signed that acceptance, without alteration or qualification, and returned it to the Land Commission on the 4th November, 1908. It was admitted by the Estates Commissioners that all negotiations for the sale were carried out, and the price agreed upon, on the basis of a 12 per cent. bonus. The vendor was unwilling to complete the sale unless such bonus would be paid.

The following question was submitted:—Whether, if the sale was carried out, the bonus at the rate of 12 per cent. would be payable?

[The revised percentage of 3 per cent. was published by the Treasury on the 24th November, 1908.]

The proposal was as follows:—

1. The Land Commission, after due inquiry, hereby propose, subject to the clauses and conditions hereinafter mentioned, to purchase, for the sum of £97,389, of which £91,364 is to be advanced from the Land Purchase Fund, and the balance £6,025 is to be lodged in cash with the Land Commission, as hereinafter provided, the lands set out in the first schedule hereto, and included with other lands in the originating request lodged in this matter, in fee-simple, subject:—

To any public rights affecting the said lands.

To any maintenance charges under the Public Works Acts.

To any interest of the tenants on the lands or of persons having claims upon those interests, and to any easements, rights and appurtenances, mentioned in section 34 of the Land Law (Ireland) Act, 1896.

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But, save as aforesaid, discharged from the claims of all persons who are interested in the lands, whether in respect of superior or intervening interests or incumbrances or otherwise.

2. The price of the tenanted lands in this matter set out in the first part of the second schedule hereto includes all rent and arrears now due, or hereafter to accrue due, save that the vendor may, within two months from this date, collect such rent and arrears as may be due and payable now, but not exceeding in the case of any tenant, one-half year's rent.

No legal proceedings for the recovery of any such rent and arrears are to be begun, continued, or enforced after the expiration of the time herein limited.

3. The vendor to enter into and lodge with the Land Commission an undertaking in the prescribed form to re-purchase the demesne and other lands in his occupation as set out in the third part of second schedule hereto at the sum of £3,850, and to effect a policy of insurance against loss or damage by fire on the dwelling-house and offices of the said demesne and lands, in the form and with a Company approved of by the Land Commission, for the sum of £700, in the name of the Irish Land Commission, for a term of sixty-eight and a half years, with all premiums thereon fully paid up and compounded for in advance, and to enter into such covenant as the Land Commission may require to observe the terms of the said policy, and to constitute the said Land Commission his attorneys for the purpose of obtaining payment of any moneys which may become payable on foot of such policy, and to lodge the policy of insurance, together with such power of attorney, with the Land Commission.

4. Undertakings in the prescribed form to re-purchase the lands set out in the first schedule hereto from persons approved of and at prices settled by them and in accordance with a scheme of re-arrangement and consolidation to be prepared by their inspector to be lodged with the Land Commission before the date of the agreement.

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5. The sum of £6,025 is to be lodged in cash with the Land Commission by the persons set out in the fourth schedule hereto when called upon so to do, and before the date of the agreement.

6. Clear possession of all the untenanted lands included in the first schedule and set out in the second part of the second schedule hereto to be given up to the Land Commission before the date of the agreement, free and discharged from all tenancies or occupation interests of any description.

7. Subject to the provisions of the Irish Land Act, 1903, the Land Commission propose to pay interest at $3\frac{1}{2}$ per cent. per annum on the purchase-money, less income tax, or so much thereof as is for the time being undistributed from the date of the agreement hereinafter referred to, until the whole of the purchase-money is distributed.

8. The vendor to agree to pay to the Land Commission interest at $3\frac{1}{2}$ per cent. per annum on the total purchase-money of the demesne and other lands so to be re-purchased by him as aforesaid. Such interest to be payable from the date of the agreement until the date when such demesne and land is revested in the vendor.

9. The vendor to agree to pay to the Land Commission interest at $3\frac{1}{2}$ per cent. per annum on the sum of cash lodged by the persons set out in the fourth schedule hereto from the date of the agreement until the whole of the purchase-money is distributed less by the amount of interest, if any, received during the same period on the sum of cash lodged.

10. The vendor to agree to pay to the Land Commission interest at $3\frac{1}{2}$ per cent. per annum on the sum £28,572, or any lesser sum, being the estimated purchase-money in respect of such of the untenanted land included in the first schedule and set out in the second part of the second schedule hereto, of which, notwithstanding clause 6 hereof, possession may, for any reason, not be taken by the Land Commission until a date subsequent to the date of the agreement, from the date of the agreement until the date on which possession of the said untenanted land is taken by the Land Commission.

11. The vendor to continue liable to and to pay all poor rates, drainage maintenance rates, sanitary rates, and all other rates,

taxes, charges, and assessments payable in respect of the demesne and lands so to be repurchased by him as aforesaid, and to indemnify the Land Commission in respect thereof.

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12. The vendor to pay all poor rates, drainage maintenance rates, sanitary rates, and all other rates, taxes, charges, and assessments payable in respect of the lands, other than the demesne dealt with in the last clause, included in the said estate, up to and including the assessment or levy, and including both moieties thereof, when payable in moieties, made in respect of any such rates, taxes, charges, and assessments next preceding the date of the agreement, and to indemnify the Land Commission in respect thereof, and to discharge all such rates, taxes, charges, and assessments payable in respect of untenanted land of which clear possession is not given at the date of the agreement, up to and including the assessment or levy, and including both moieties thereof, when payable in moieties, made in respect of any such rates, taxes, charges, and assessments next preceding the date on which possession of such untenanted lands is given to the Land Commission, and to indemnify the Land Commission in respect thereof: provided always that this paragraph shall not apply to rates, taxes, charges, or assessments properly payable by the occupying tenants in respect of their holdings at the date of the agreement.

13. The Land Commission may, at any time, when and so long as it seems just to them so to do, deduct from any interest payable by the Land Commission any sums payable to them under any of the foregoing clauses, or any sums which the Land Commission may, in their absolute discretion, pay in respect of any rents, rates, taxes, charges, and assessments which the vendor is bound to pay.

14. As an additional security for the payment to the Land Commission of any sums payable by the vendor under any of the foregoing clauses, or any sums which the Land Commission may, in their absolute discretion, pay in respect of any rents, rates, taxes, charges, and assessments which the vendor is bound to pay, the vendor to agree to the payment of all such sums out of any part of the purchase-money of the estate which may be payable to him.

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15. The purchasers whose names are set out in the fifth schedule hereto respectively to effect policies of insurance against loss or damage by fire on the respective dwellinghouses and offices on their holdings, in the form and with a company approved of by the Land Commission, for the respective sums set out opposite their names in the said schedule, in the name of the Irish Land Commission for a term of sixty-eight and a half years, with all premiums thereon fully paid up and compounded for in advance, and respectively to enter into such covenant as the Land Commission may require to observe the terms of said policies and to constitute the said Land Commission their attorneys for the purpose of obtaining payment of any moneys which may become payable on foot of such policies, and to lodge the said policies of insurance, together with such powers of attorney, with the Land Commission.

16. The lands included in the third schedule hereto are also included in the originating request in this matter, but are not included in this offer.

17. In the event of one or more of the persons set out in the fourth schedule hereto failing to so lodge the sum in cash in such schedule set opposite their respective names, the Land Commission hereby offer to purchase the residue of the lands mentioned in the first schedule hereto, after excluding the holding or holdings of any such person or persons so making default, for a sum calculated by deducting the full purchase-money for every such holding so excluded as aforesaid from the said sum of £97,389, being the price offered for the lands in the first schedule hereto.

18. That on or before the date of the agreement, the persons mentioned in the sixth schedule hereto convey, assign, and surrender to the Land Commission portions of their holdings, to be defined by the Estates Commissioners' Inspector, respectively equivalent in value to the sums set out in said schedule, absolutely freed and discharged from all charges, liabilities, and equities affecting the same.

19. The date of the agreement to purchase shall be the date on which the Land Commission by order declare that the statutory conditions and the conditions of this proposal have been

fulfilled, and that they agree to purchase the estate for the estimated price.

[Schedules.]

Ronan, K.C. (Henry, K.C., with him), for the vendor :—

The negotiations have been carried out on the basis of a 12 per cent. bonus. The net question is—When was the agreement entered into within the meaning of sect. 48 (3) of the Act of 1903? One very simple test is—Could the property have been sold to anyone else after the proposal had been accepted by the vendor? No, because the vendor had bound himself to sell to the Estates Commissioners.

The elementary principles of the law of contract are stated in Pollock on Contracts (6th ed.), at pp. 2, 3. The one thing we have to find to complete the contract is an unconditional acceptance. The strict law in relation to land purchase contracts is laid down by Holmes, L.J., in *Sherlock's Estate* (1). The basis of the law is that the conditional agreement is the contract for sale. The only question is whether the reference to a subsequent document prevents the former from constituting a final agreement. The law on the subject is stated in Pollock on Contracts, at p. 42. In *Tottenham's Estate* (2), Meredith, J., held, in effect, that, in a sect. 6 case there was a valid agreement when the proposal was accepted. The proposal there contained the clause, "if . . . agrees to sell," which contemplated a future agreement. There is nothing like that in the present case. As soon as the proposal is accepted it is capable of being registered as a *lis pendens*.

Serjeant O'Connor, K.C., for the Treasury :—

What is the agreement referred to in sect. 48 (3)? It is, first, a proposal subject to clause 19 of the proposal, i.e., that the agreement is to be taken as of the date of the declaration by the Land Commission. The other clauses bear this out. Take, for instance, clauses 6, 7, and 8; they are to operate as from the date of the agreement to purchase. There is possibly an exception in the case of clause 2, which would operate as from the date of the

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(1) [1899] 2 I. R. at p. 605.

(2) 39 Ir. L. T. R. 264.

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acceptance of the proposal. The agreement is one not between the vendor and his tenants, but between the vendor and the Land Commission under sect. 6. Accordingly we must go to sect. 6 to see what is the agreement the Land Commission entered into, what is the agreement they have power to enter into, and at what date it is entered into.

Under sub-sect. 1 they may propose to purchase the estate. Sub-sect. 2 goes on to state what the owner of the estate may do. There must be an acceptance of the proposal. Apparently agreements are constituted by the acceptance of the proposal; but the statute, in effect, provides that this is not the real agreement. The latter part of the sub-section contains the only power which the Land Commission have to purchase the estate. They have no power to enter into an agreement to purchase until—(1) the owner has agreed to sell; and (2) the requisite number of tenants have undertaken to purchase. This is the agreement that is referred to in section 48 (3). The proposal and acceptance are to be regarded as intimating the willingness of the Land Commission, on the one hand, to propose, and of the vendor, on the other hand, to enter into an agreement, to be followed by an actual agreement. That is really the meaning of clause 19 of the proposal. *Sherlock's Estate* (1) does not affect the question here, as it was a case of an agreement between landlord and tenant. The agreement in section 48 (3) is the same as the agreement referred to in the latter part of section 6 (2).

Henry, K.C., in reply :—

There is nothing in section 6 (2) necessitating two conditions to be established before agreement is entered into by the Land Commission. On the fair construction of the sub-section there is nothing to prevent the Land Commission from entering into a conditional agreement. Section 48 (3) contemplates the agreement constituted by the proposal and acceptance; and this agreement was entered into before the 24th November, 1908.

(1) [1899] 2 I. R. 591.

WYLLIE, J.:—

[After stating the facts as already set out, his Lordship continued:]

The answer to the question that has been submitted to me depends on the true construction of sub-sect. 3 of section 48 of the Act of 1903, and the legal effect of the proposal and acceptance.

The sub-section provides that after certain periods the Treasury may revise the percentage; and in such case the revised percentage shall apply to all agreements for the purchase of estates entered into after the date of its publication.

A revised percentage of 3 per cent. was published by the Treasury on the 24th November, 1908; and the question is, whether the 12 per cent. or the 3 per cent. bonus will apply to the present sale if carried out.

The answer to this question therefore depends on whether, if this sale is carried out, the agreement for purchase was entered into prior to the 24th November, 1908.

Now the proposal of the 28th August, 1908, was a definite and absolute proposal, subject to the clauses and conditions therein mentioned, to purchase the estate for a certain specified sum; and the document signed by the vendor on the 30th October, 1908, was an absolute and unqualified acceptance of that proposal. Such a proposal and acceptance would undoubtedly, as between an ordinary vendor and purchaser, constitute an agreement for purchase. If any authority were needed for this, it would be sufficient to refer to the judgment of Lord Justice Holmes in *Sherlock's Estate* (1). Is there, then, anything in the constitution, powers, or contracting capacity of the Land Commission, or in any of the terms or conditions of the proposal itself, to prevent the ordinary rule from applying? In *Tottenham's Estate* (2), where there was a similar proposal and acceptance, the present Master of the Rolls held that the Estates Commissioners were bound to carry out the agreement in its entirety when the conditions were fulfilled, and that the vendor was entitled to interest on the purchase-money under section 18, sub-section 2, from the

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(1) [1899] 2 I. R. 606.

(2) 39 Ir. L. T. R. 264.

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date contemplated by the proposal before which the conditions should be fulfilled; and though the only point for decision in that case was as to the date from which interest was payable, still the Master of the Rolls was clearly of opinion that the proposal and acceptance constituted a binding agreement.

Now, though the clauses and conditions of the proposal in this case differ in many respects from those in the proposal in *Tottenham's Case* (1), those differences only arise from special circumstances in the case which had to be provided for by special conditions. There is one clause, however, in this proposal that was not in the proposal in *Tottenham's Case* (1), viz.: clause 19, which is in these terms—"The date of the agreement to purchase shall be the date on which the Land Commission by order declare that the statutory conditions and the conditions of this proposal have been fulfilled, and that they agree to purchase the estate for the estimated price"; and Serjeant O'Connor, on behalf of the Treasury, contends that this clause distinguishes this case from *Tottenham's Estate* (1) and prevents the proposal and acceptance from constituting a contract, and that in fact the proposal and acceptance will not amount to an agreement for purchase until the order referred to in clause 19 is made, fixing the "date of the agreement."

But it is only necessary to read the several clauses of the proposal to see that the words "the date of the agreement," in clause 19, and in the several other clauses, have a special meaning, and that clause 19 is, in fact, in the nature of an interpretation clause defining the meaning of those words where they occur in ten of the nineteen clauses contained in the proposal; and the "date of the agreement," where the words so occur, would appear to correspond with the date which, in an ordinary agreement for purchase of land, is fixed as the date of completion.

I have no doubt that clause 19 was inserted in the proposal to meet the difficulty that arose in *Tottenham's Case* (1), and to provide a mode of definitely fixing a date for completion instead of leaving it to be ascertained by a doubtful interpretation or construction of the agreement. This I think was the only object

and effect of the clause, and it did not, in my opinion, prevent, and was not intended to prevent, the proposal when accepted from constituting an agreement to purchase.

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The other ground relied upon by Serjeant O'Connor for his contention that the proposal and acceptance did not constitute an agreement for purchase is based on sub-section 2 of section 6 of the Act of 1903. Sub-section 1 prescribes what must be done by the owner of the estate and by the Land Commission respectively in order to enable the Land Commission to estimate the price and make a proposal to purchase, and then sub-section 2, on which Serjeant O'Connor's argument is based, provides that "if within the prescribed time the owner of the estate agrees to sell the estate at the estimated price, and tenants of holdings on the estate, to the extent of not less than three-fourths in number and rateable value, undertake to purchase from the Land Commission their holdings, or other designated parcels of land in lieu thereof, for the respective amounts on the basis of which the price of the tenanted portion of the estate was estimated by the Commission, the Commission may agree to purchase the estate for the estimated price."

Now Serjeant O'Connor's contention is that the frame of that sub-section shows that the Land Commission has no power to enter into an agreement for purchase until after the owner has agreed to sell at the estimated price, and the required undertakings have been given. In other words, that the sub-section prescribes a necessary chronological sequence for the several acts therein referred to. I can see nothing in the sub-section requiring such a construction; and, in my opinion, that is not its true construction. The sub-section appears to me to do no more than empower the Land Commission to enter into an agreement to purchase an estate, provided certain statutory conditions are complied with, and it seems to me to be utterly immaterial whether the agreement to purchase is entered into before or after the statutory conditions have been fulfilled, provided the agreement is made subject to those conditions and is to be completed only in case of their fulfilment.

In my opinion, therefore, the proposal and acceptance in this case constitute an agreement for purchase, and though the

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"date of the agreement," for certain purposes, is, by its terms, to be a date hereafter to be fixed by order of the Land Commission, the agreement for purchase was within the meaning of section 48, sub-section 3, entered into on the 30th October, 1908, the date of acceptance, or at latest on the 4th November, 1908, when the acceptance was lodged with the Land Commission.

The bonus, if the sale is carried out, will, therefore, be at 12 per cent.

Solicitors for the vendor: *Blake & Kenny.*

Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

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1909.

Feb. 22.

IN THE MATTER OF THE ESTATE OF RICHARD WARNEFORD BOYLE, OWNER; ROSABEL FLEUSS, PETITIONER.

Land Purchase Acts—Sale of estate to tenants by Land Judge—Bonus under Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 48.

An estate, the subject of an absolute order for sale in the Land Judge's Court, was sold by the Land Judge to the occupying tenants, the purchase-money being furnished by means of advances of money in the manner provided by section 27 of the Irish Land Act, 1903; but no declaration having been made by the Estates Commissioners that the estate was fit to be regarded as a separate estate for the purposes of the Act:—

Held, that the sale was not a sale of an estate under the Act of 1903 within the meaning of section 48 (1) of the Act of 1903, and that the bonus or percentage mentioned in the said section was not payable in respect of such sale.

FINAL SCHEDULE OF INCUMBRANCES.

Application by the owners for a declaration that the vendors were entitled to the bonus or percentage from the Land Purchase Fund in respect of the estate sold in the matter.

The estate was sold by the Land Judge to the tenants under form 34A, each tenant in occupation of his holding agreeing to purchase his holding from the Land Judge, provided the Land Commission should make the advance applied for. The advances

to the tenants were made in money, in the manner provided by section 27 of the Irish Land Act, 1903; but the Estates Commissioners had not declared the estate fit to be regarded as a separate estate for the provisions of the Act.

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Neither section 40 of the Land Act of 1896 nor section 48 (4) applied to the estate, the owners having a substantial interest in the estate, and no receiver having been appointed over it.

W. M. Jellett, K.C., for the owners having carriage of the sale:—

It is suggested that where an estate is sold to tenants by the Land Judge the bonus cannot be obtained unless proceedings are taken under section 7 of the Land Act, 1903. The argument goes on the meaning of the word "estate" in section 48 (1). The word "estate" is used in different significations throughout the Act. In section 48 (4) it means the interest of the owner in the lands: *In re Carroll's Estate* (1). It is used with different meanings throughout section 7: *In re Madden's Estate* (2); *In re Holmes' Estate* (3); *In re Howlin's Estate* (4). In section 48 (1) the word "estates" means estates in every sense, and includes all estates sold under the Act. The present sale has been carried through by means of advances of cash as provided by section 27 of the Act of 1903, and not by means of a guaranteed land stock. Section 48 contemplates the bonus being payable in respect of sales in the Land Judge's Court, and does not confine the bonus to the estates declared to be separate estates for the purpose of the Act under section 98. The proviso in section 48 (1) is subject to no limitation that the sale is to be carried out under section 7. In Cherry and Maxwell's Irish Land Acts, at p. 1107, the view is expressed that the bonus is payable in respect of all estates sold by the Land Judge to tenants under the Land Purchase Acts, except those mentioned in sub-section 4 of section 48. The ordinary case of a landlord selling to a tenant is not a sale under section 1 of the Act of 1903. That section merely provides that advances shall be made in certain cases, but the agreement for sale

(1) [1906] 1 I. R. 661; [1907] 1 I. R. 148. (3) [1907] 1 I. R. 1.

(2) [1907] 1 I. R. 351, 354.

(4) [1906] 1 I. R. 300.

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is not made under the section. In the present sale the Land Judge occupies the position of the ordinary landlord selling to the tenants, and the machinery for carrying out the sale is provided by the Act of 1903. If the present sale is not a sale under the Act of 1903, the result would be that the only possible sales under the Act of 1903 would be sales under sections 6, 7.

Serjeant O'Connor, K.C., for the Treasury :—

The question here is, Was the present sale a sale under the Act of 1903? A distinction is drawn between sales under former Acts and sales under *this* Act. It is not sub-section 4, but sub-section 1 of section 48 which gives the bonus. "Under this Act," section 48 (1), means under sections 1, 6, and 7 of the Act of 1903. The word "estate" in sections 1, 6, and 7 means lands declared by the Estates Commissioners fit to be regarded as a separate estate. *In re Carroll's Estate* (1) has no application, as the only question there was whether the estate of Ottley was the same as the estate of Carroll.

Ross, J. :—

I regret I cannot see my way to decide in favour of the applicants, and declare the vendors entitled to the bonus. From the point of view of common sense I cannot see any reason why a person selling under Form 34A should not have as good a claim as one selling under section 7 of the Act of 1903. Mr. Jellett argues that the bonus is payable in respect of all sales of estates sold under the Land Purchase Acts, unless the case falls within one of the exceptions contained in sub-section 4 of sect. 48; and, the present case not falling within any of the exceptions, the general rule applies. What is the general rule? There must first be an estate. It is plain that the word "estate" has had no fixed meaning throughout the Act. I do not express any opinion on its meaning here. The only question I decide is whether the present sale is a sale under the Act of 1903. I am of opinion that it is not. A distinction is manifestly drawn all through the

(1) [1906] 1 I. R. 661; [1907] 1 I. R. 148.

Act between sales under the Act of 1903 and sales under the earlier Acts. To bring the sale under the Act of 1903 Mr. Jellett laid much stress on the fact that the purchase-money must have been money got under the Act of 1903, because it was obtained by means of advances of cash, and not by means of guaranteed land stock. But section 27 applies to all the Land Purchase Acts. It provides that advances for the purposes of the Land Purchase Acts shall, in the case of agreements entered into after the passing of the Act of 1903 be made by means of money, and not by means of guaranteed land stock, and any sums required for those purposes shall be issued out of a special fund to be called the Irish Land Purchase Fund. That, however, does not mean that all sales in which the purchase-money is raised in cash are sales under the Act of 1903. For instance, are sales under section 40 of the Act of 1896 sales under the Act of 1903? I think not; they are sales under the Act of 1896, although the money is advanced under the Act of 1903. I therefore declare that the bonus is not payable in respect of the present sale.

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Solicitors for the owners having carriage : *Barrington & Son.*

Solicitor for the Treasury : *W. G. Towers.*

D. M. S.

Barton, J.

1908.

Feb. 10.

IN RE M'AFEE.

MACK v. QUIREY.

(1908. No. 989.)

*Will—Construction—General legacy—Bank shares—Subdivision of shares—
Change in value—Will speaking from death—Wills Act, 1837 (1 Vict.
c. 26), s. 24.*

A testatrix by her will bequeathed to her executors "ten old Belfast Bank shares," upon trust to pay the income, dividends, and profits thereof to a son of testatrix's cousin for his life, and, subject thereto, upon trust for any widow he might leave and his children, share and share alike. At the date of the will the shares were £100 shares, of the value of £129 each. By a binding resolution of the Company it was resolved that the shares should be subdivided into ten shares of £10 each, and that the substituted shares should be called and known as "old Belfast Bank shares." These shares were of the value of £12 13s. each at the date of her death:—

Held, that the legacy was a general legacy, and that there being no contrary intention to exclude the operation of section 24 of the Wills Act, the legatee was only entitled to ten of the subdivided old Belfast Bank shares, or their value, to be ascertained at the testatrix's death.

By her will, dated the 14th December, 1904, Jane M'Afee, of Lisburn, county Antrim, made the following, among other, dispositions:—

"I leave to my said executors and trustees twenty shares I hold in the Lisburn Gas Company, in trust to pay the income, dividends, and profits thereof to my cousin, Sarah Quirey, for the term of her natural life; and, subject thereto, in trust for her daughter, Jemima, absolutely. I leave to my said executors and trustees ten old Belfast Bank shares, in trust to pay the income, dividends, and profits thereof to William Quirey, son of my said cousin, for the term of his natural life, and, subject thereto, in trust for any widow he may leave and his children, share and share alike."

The testatrix, after certain other bequests and devises, disposed

of the residue of her property of every nature and kind for the benefit of the Presbyterian churches which she named. *Barton, J.*
1908.

The testatrix died on the 22nd August, 1908, and probate of her will and codicils was granted to her executors on the 25th September, 1908. MACK
v.
QUIREY.

It appeared that at the date of the will, on the 14th December, 1904, the old Belfast Bank shares were £100 shares, and were of the value of £129 each. Subsequently, between the date of the will and the death of the testatrix, the old Belfast Banking Company, by a resolution which was duly passed and binding on the shareholders, resolved that late old Belfast Bank shares should be divided into ten shares of £10 each, and that the subdivided shares should be called and known as "old Belfast Bank shares." At the date of the death of the testatrix these subdivided shares were of the value of about £12 13s. a piece. The testatrix held ten old Belfast shares of £100 each at the date of the will, and retained the certificates for the same until her death.

The present summons was taken out by the executors of the will for the determination of, among others, the following questions:—

1. Whether William Quirey and his wife and children were entitled to have invested, upon the trusts of the will, the value of the ten old Belfast Bank shares—
 - (a) As of the date of the will of the 14th December, 1904; or,
 - (b) As of the date of the death of the said testatrix.
2. Or whether the said legacy failed altogether.

John McGonigal, for the executors.

Bates, K.C., and *Best*, for the defendant, William Quirey:—

If the legacy be specific, the testatrix had substantially the same property at the time of her death as at the date of the will, and therefore the shares, as they existed at the date of the will, would pass: *Oakes v. Oakes* (1). If the legacy be general, it is

Barton, J. impossible to construe the will except by attributing to the language used the meaning it bore at the date of the will. If the meaning at the date of death is entirely altered, you cannot attribute such altered meaning to the testator. That is not the effect of the Wills Act.

1908.
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QUIREY.

Notwithstanding sect. 24 of the Wills Act, we are not bound to look to the date of death only, but also the facts as they were at the date of the will: see the judgment of Lindley, L.J., in *In re Portal and Lamb* (1). The words used here could only have a particular meaning at a particular time; and once the meaning of the words is ascertained, they can have no other meaning. The legacy failed in *In re Gray* (2) because the amount of the legacy which testator intended to give had become non-ascertainable at the date of the death, but here the value of the shares at the date of the will can be easily ascertained by the simple process of multiplication.

J. H. Pigot, for the Commissioners of Charitable Donations and Bequests:—

Even assuming the legacy to be specific, it would be adeemed, the subject-matter having become completely changed, and the change being effected by a resolution of the Company, which is a voluntary act on the part of the shareholders and not by an Act of Parliament, or otherwise by an involuntary act of the shareholders: *In re Gray* (2); *In re Lane* (3); *Slater v. Slater* (4). If the legacy be general, then, as there is no contrary intention to exclude the operation of section 24 of the Wills Act, the will must speak as of the date of death, and the shares that will pass are the shares as they exist at the date of the death of the testatrix, and their value must be ascertained as of that date. Even if a contrary intention could be gathered from the will, the value of the shares could not be ascertained at the date of the will, as that would amount to the ascertaining the value of things which were non-existent at the date of death.

(1) 30 Ch. D. 50.

(2) 36 Ch. D. 205.

(3) 14 Ch. D. 836.

(4) [1907] 1 Ch. 665.

In connexion with this subject, the cases which arise may be divided into three classes—(1) where, as here, new property is substituted for the old; (2) where there is nothing answering the description, and there is an absolute ademption; (3) where there is no change except in name, as in *Oakes v. Oakes* (1). In the cases referred to the condition of the property was inconsistent at the date of death with the words used. In *In re Gray* (2) there was a difference in the Company and the liability on foot of the shares. Here there is no difference in the Company, but there is a difference in the shares. In *Oakes v. Oakes* (1) the word “my” was used, which stamped the character of the gift. The observations of Lindley, L.J., in *In re Portal and Lamb* (3), referred to by Mr. Bates, were not adopted by Fry, L.J.

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James Henry, for the charities, supported the contention put forward on behalf of the Commissioners of Charitable Donations and Bequests. He cited *Beddington v. Banmann* (4).

BARTON, J.:—

The legacy of “ten old Belfast Bank shares” was, in my opinion, a general legacy, although the testatrix had that number of shares at the time. Its language may be contrasted with that of the immediately preceding legacy of “twenty shares *I hold in the Lisburn Gas Company*,” which is specific. In *MacDonald v. Irvine* (5) there was a similar juxtaposition of a specific and a general legacy of Egyptian Bonds. Having come to the conclusion that this was a general legacy, I am relieved from the necessity of considering that part of Mr. Bates’s argument which proceeded upon the hypothesis that the legacy was specific.

I can see nothing in the will to show any contrary intention, within the meaning of section 24 of the Wills Act. Accordingly, the ordinary rule will apply, and the legatees will only be

(1) 9 Hare, 666.

(2) 36 Ch. D. 205.

(3) 30 Ch. D. 50.

(4) [1903] A. C. 13.

(5) 8 Ch. D. 101.

Barton, J. entitled to ten of the subdivided old Belfast Bank shares, or
1908. their value, to be ascertained at the death (1).

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Solicitor for the executors: *Joseph Lockhart.*

Solicitor for the defendants: *J. C. M'Gifford.*

Solicitors for the Commissioners of Charitable Donations and

Bequests: *Maxwell & Weldon.*

Solicitor for the charities: *Joseph Allen.*

J. MACM.

(1) See also the case of *In re Gillins; Inglis v. Gillins* ([1909] 1 Ch. 345).
—[REP.]

EISENHARDT v. TALBOT.

(1905. No. 870.)

Barton, J.

1909.

Feb. 23.

Administration—Estate insufficient to pay costs—Executor's costs—Costs of realization—Priority—Practice.

In an administration suit instituted by a simple contract creditor, practically the only assets consisted of a hotel, and the furniture and stock-in-trade therein. The premises were ordered to be sold. The defendant, the executrix, did not ask for carriage of the sale, which was given to the plaintiff. The funds in Court proved only sufficient to pay the costs of the executrix, after providing for the costs of allocation. The plaintiff applied to have the costs of the sale paid in priority to those of the executrix :—

Held, that the plaintiff was not entitled to be paid out of the funds in Court for costs of sale in priority to the costs of the executrix.

ALLOCATION.

The primary decree for administration in the case was made in January, 1906, the plaintiff being a simple contract creditor.

Practically the entire assets consisted of a small hotel, known as the Dowros Bay Hotel, situate in the county of Donegal, and the furniture and stock-in-trade therein. The hotel premises were held under a lease, with only a few years to run, and subject to a heavy head rent.

A receiver was appointed over the premises, with the defendant, who was the executrix of the deceased, as manager at a salary.

Eventually, at the instance of the other creditors of the deceased, an immediate order for sale by auction of the premises was made. The executrix did not ask for carriage of the sale, which was given to the plaintiff. There was only one bid of £150, which the Court refused to accept, and on the application of the plaintiff ordered the premises to be advertised for sale by private tender, the parties having liberty to tender. There was only one tender of £150, but the plaintiff offered £200 for the premises and was accepted as purchaser.

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After providing for arrears of head rent, and certain payments made by the plaintiff, which by consent were treated as salvage payments, and the costs of allocation—there remained a sum of £120, which was only sufficient to pay the taxed costs of the defendant (the executrix).

The plaintiff applied to vary the allocation schedule by being declared entitled to be paid the costs of and incidental to the sale of the premises, amounting to about £58, in priority to the costs of the executrix.

Gerald Fitz Gibbon, K.C., for the plaintiff:—

The plaintiff has incurred the costs of realizing the assets for the benefit of all parties; and his outlay in connexion with the sale should be allowed in priority to the costs of the executrix being in the nature of salvage payments. That was the course adopted in a case of *Counihan v. Counihan* (1) in this Court. The carriage of the sale was given to the plaintiff with the consent of the executrix, who was thereby relieved of incurring any costs in connexion with the realization of the assets. It is quite true that where an estate is insufficient to pay the entire costs, the usual order of priorities is—1, executor's costs; 2, costs in and about sales and getting in of the estate: see *Seton on Decrees* (1893), vol. ii., p. 1266; *Wetenhall v. Dennis* (2); *Ramsay v. Simpson* (3). In those cases, however, the particular question here did not arise, as there were obviously sufficient funds to discharge the costs of sale as well as the costs of the executor, and every case must depend on its own special facts.

Mac Mahon, for the executrix:—

It is quite immaterial whether the costs incidental to the sale can be regarded as salvage expenditure or not, and it is also immaterial whether the sale was carried out by the personal representative or not. In the case of a suit brought by a simple contract creditor for administration, if the assets prove insufficient to pay the costs of the personal representative in full, the plaintiff will be ordered to make good the deficiency: see the judgment of the Vice-

(1) Unreported.

(2) 33 Beav. 285.

(3) [1899] 1 I. R. 69.

Chancellor in *Leonard v. Kellett* (1); and the Vice-Chancellor states that to be the principle upon which he invariably acted. Therefore the personal representative is entitled to a personal indemnity from the plaintiff in the event of the funds proving insufficient for his costs. If the sale had been conducted by the personal representative, it would have rendered the estate insufficient for the payment in full of the executrix's costs, and she would have been entitled in that event to an order upon the plaintiff to personally make good the deficiency. The executrix did not ask for carriage, owing to a desire to avoid incurring costs where the estate was obviously insolvent. The plaintiff from the start was well aware of the insolvency of the estate. He was warned by the executrix against incurring further costs, and refused an offer of a composition prior to any proceedings, which was approved of and accepted by the other creditors. Having insisted on unnecessary proceedings the result of which is to leave nothing for the other creditors, there would be sufficient grounds upon the authorities for asking that he should be made to pay the entire costs of the suit; but such an order was not sought for.

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In all the cases and text-books, the personal representative's costs are given in priority to the costs of realization. In *Counihan v. Counihan* (2) there was sufficient to pay the personal representative in full, and the question here did not arise, nor was it argued.

R. Maunsell, for the receiver.

BARTON, J. :—

I find by reference to the proceedings and orders in *Counihan v. Counihan* (2) that the question did not arise in that case, because there were sufficient funds to pay both the costs of sale and the costs of the executrix in full. In the present case I shall direct payment in the following order:—(1) costs of allocation; (2) executrix's costs. That will exhaust the fund. If the costs of sale had been incurred by the executrix, there would not have been sufficient to pay her costs of suit in full; and the question would then have been, as Mr. MacMahon pointed out, whether the plaintiff should not have to pay the deficiency. In the present case,

(1) 27 L. R. Ir. 418.

(2) Unreported.

Barton, J. however, I am not asked to make any order against the plaintiff;
 1909. and it has not become necessary for me to consider the case from
EISENHARDT that point of view.
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Solicitors for the plaintiff: *Meccredy & Son.*

Solicitor for the executrix: *P. M. Gallagher.*

Solicitors for the receiver: *Browne & Maunsell.*

J. MAC M.

Ross, J. IN THE MATTER OF THE ESTATE OF DOMINICK RICHARD
 1909. MAHONY, OWNER; HELEN REDMOND AND FRANCES
 March 30. FITZGERALD, PETITIONERS; AND IN THE MATTER OF
 THE ESTATE OF EMILY BOISSEVAIN AND OTHERS,
 OWNERS OF LAND; AND IN THE MATTER OF THE PAR-
 TITION ACTS, 1868 AND 1876.

Practice—Partition suit—Costs—Special costs—Form of order.

In partition suits the general rule is that all costs properly incurred for the purpose of realization and division are paid out of the entire proceeds of sale; but where there are special costs incurred in respect of one particular share, such share must bear the whole of such special costs.

OBJECTION to final schedule of incumbrances.

The lands, the subject of the order for partition and sale in the matter, were divided into three denominations. Part 1 comprised the lands of Mount Collins; part 2 comprised house property in the City of Cork; part 3 comprised the lands of Knoppoge. The petitioners having carriage of the sale were interested as incumbrancers on the share of Dominick Richard Mahony. Dominick Richard Mahony was the owner of five-sixteenths of part 1 and of one equal undivided moiety of parts 2 and 3. The undivided shares of all the hereditaments and premises ordered to be sold in the matter, save the undivided share of Dominick Richard Mahony, were wholly unincumbered. There was litigation and considerable expense incurred in the Land Judge's Court and in the Court of Appeal, by reason of Dominick Richard Mahony

showing cause against the conditional order for sale obtained in the matter by the petitioners. The owners, other than Dominick Richard Mahony, did not at any time offer any opposition to the premises being sold under the Partition Acts.

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The objection of the owners, Hercules MacDonnell, Alfred MacDonnell, Emily Boissevain, and Charles Boissevain, to the final schedule of incumbrances stated that the objectors were the owners of five-sixteenths of the lands at part 1, and of one equal moiety of the lands at part 3. While admitting the right of the petitioners having carriage of sale to the payment thereof of their general costs of the sale of the entire property, the objectors objected and claimed that all the costs connected with the litigation aforesaid, or consequent thereon, should be paid exclusively out of the proceeds of the sale of Dominick Richard Mahony's share. They also objected to the inclusion in the general costs of sale of any costs connected with the appointment, accounting, or discharge of the receiver appointed in the matter, and also of any costs incurred by the petitioners in taking out probate of the will of D. F. Mahony, and claimed that same should be paid exclusively out of the proceeds of the sale of Dominick Richard Mahony's share. The objectors also objected to any of the petitioners' costs incurred in reference to the lands at part 2 being charged against the objectors' shares (the objectors having no interest whatever in the lands at part 2), except in so far as the lands at part 2 had a common title to those at parts 2 and 3.

G. W. Walker, K.C., for the objectors :—

The owners, other than D. R. Mahony, did not object to the order for sale of the entire estate. D. R. Mahony showed cause against the order for sale, and obtained an order which was reversed by the Court of Appeal. We submit that no portion of these costs are chargeable in the general costs of sale. The receiver was appointed over the share of D. R. Mahony only, and therefore all costs connected with the receivership should come out of his share. Certain costs have been incurred by the objectors' solicitor, to facilitate and enable the petitioners to carry out the sale of the entire estate. These costs must be paid in the same priority as the general costs of sale.

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W. M. Jellett, K.C. (with him *Jonathan Pim*), for the petitioners having carriage :—

The ordinary rule as to costs in a partition suit is that the costs are to be borne by the parties in proportion to their respective interests: *Thompson v. Richardson* (1); *Cannon v. Johnson* (2). We agree that the costs of the receiver should be paid out of the share of D. R. Mahony. As regards the costs of taking out probate to the will of D. F. Mahony, these are costs connected with proving the title. The title of all the parties must be vouched before the sale can be carried out: *Belcher v. Williams* (3); *Catton v. Banks* (4).

Jonathan Pim :—

If this had been merely a partition, and if there had been no mortgage, it would have been necessary to make title to D. R. Mahony's share. Those costs are the ordinary costs of the vendors, and must be distributed over all the estate. The costs of proving the title of one party are incurred on behalf of all the parties for the purpose of realization.

Ross, J. :—

I think that the principle involved in this case is clear. Every man who takes a mortgage of an undivided share of real estate must be presumed to know that the property is liable to be partitioned. The general principle is laid down by Kekewich, J., in *Catton v. Banks* (4). He says (at page 224) :—" It is settled practice to allow the costs of what is commonly called a 'partition action'—that is, an action in which property is sold for the purpose of distributing the proceeds among two or more parties entitled thereto out of the entire proceeds of sale; and, so long as the costs incurred in respect of each share are roughly of about the same amount, the rule works fairly to all concerned, and each party entitled gets, in the ultimate result, a sum calculated on the basis of his paying the share of the entire costs exactly proportioned to his share in the property sold. The fairness of

(1) I. R. 6 Eq. 596.

(2) I. R. 11 Eq. 90.

(3) 45 Ch. D. 510.

(4) [1893] 2 Ch. 221.

the rule would be somewhat disturbed by the costs incurred in respect of any one share largely exceeding those incurred in respect of the other shares. But it is not usually necessary or right to inquire into such matters, the broad view being that all the costs properly incurred in order to realization and division are incurred on behalf of all the proprietors."

But when there is litigation, or when there are special costs, in respect of one particular share, the particular share should bear the whole of the special costs. In this case all the litigation has taken place in connexion with one share. It is therefore just and right that such special costs should be paid out of the proceeds of that share.

I propose, for the guidance of the Taxing Master, to make a special order dealing with the whole matter.

The form of the order was as follows :—

"IT IS ORDERED by the Court that on the taxation of the costs of the solicitor having carriage of the sale, the Taxing Master shall have regard to the following directions, that is to say: That he shall segregate the costs incurred in connexion with the sale of the different parts of the estate, viz.—Part 1, the lands of Mount Collins, Co. Limerick; part 2, premises in Dominick Street, Mulgrave Street, Rowland's Lane, Lloyd's Lane, Moylan's Lane, and Quarry Lane, in the City of Cork; part 3, premises in Knoppoge, in the North Liberties of the City of Cork. And the Court doth declare that the general costs of sale in connexion with each such part are to be borne by the shares of the several owners in proportion to the undivided shares of each such part of the estate to which such owners are entitled; but any special costs incurred in connexion with the sale of the undivided share or shares of any owner or owners are to be borne by the share or shares of such owner or owners. And the Court doth declare the owners, other than Dominick R. Mahony, entitled to their costs of the proceedings for sale, with the same distinction between general and special costs, and to be payable as hereinbefore mentioned; and, accordingly, let the Taxing Master distinguish between general and special costs in connexion with each undivided share. And the Court doth direct that the costs of all parties of the receiver proceedings properly and necessarily incurred in connexion with this matter are to be borne exclusively by the shares of the estate to which Dominick R. Mahony is entitled in the same priority as the

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petitioners' costs of sale. And the Court doth direct that the costs of the said petitioners, and of the said H. H. MacDonnell and others, of the said objection of H. H. MacDonnell and others, and argument thereon, be borne by said share of Dominick R. Mahony in the same priority as the petitioners' costs of sale."

Solicitor for the petitioners having carriage : *T. T. L. Overend.*

Solicitors for the objectors : *Rooke & Rooke.*

D. M. S.

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IN THE MATTER OF THE ESTATE OF DEANE DRAKE.

Oct. 29.
Nov. 3.

Statutes of Limitations (3 & 4 Wm. 4, c. 27, ss. 2, 25; 37 & 38 Vict. c. 57, ss. 1, 10)—*Rent—Charity—Express trust.*

Appeal.
Dec. 8, 9, 21.

A testatrix, the predecessor in title of the vendor in this matter, died in 1811, having first made her will, by which she devised her real estate, including lands in county Kildare, to trustees and their heirs, subject to certain annuities, upon trust to permit G. D. to take the rents thereof for his life, with remainder upon trust and to the use of his first and other sons in tail male, with remainder to his daughters in tail general, with limitations over. The testatrix, after devising certain annuities, which she charged upon portion of her Kildare estate, directed her trustees to raise the amount of certain legacies bequeathed by her, and also a sum of £3000 for the erection of a mansion-house by a sale of timber on portion of her real estate, and to levy any deficiencies by a sale or mortgage of a competent part of her other property, her Kildare estate to be first resorted to after the sale of the timber. By a codicil to her will the testatrix directed that all her yearly subscriptions to the Ross and Waterford charities should be for ever continued, the Waterford charities (which comprised those in question in the present case) to be paid out of the part of her estate bequeathed to the W.s (i.e., the Kildare estate); and, by a further codicil, she directed that her Stokestown estate should for ever continue her subscriptions to the several Ross charitable institutions, and that the like subscriptions "be for ever paid out of my county Kildare [*sic*] to my several Waterford charitable institutions."

By a report of a Master in Chancery, made in a suit to administer the estate of the testatrix, her subscriptions to the Waterford charities, being certain annual payments formerly made by the testatrix to charitable institutions in Waterford, amounting in all to £14 4s. 10½d. yearly, were ascertained and declared to be perpetual charges on the said lands of Kildare. A sale of

the said lands having been effected, under the provisions of the Irish Land Act, 1903, a question arose on allocation of the purchase-money as to the existence of three of the charges, no payments on account of them having been made for more than twenty-five years prior to the date of the agreements for sale:—

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that the charges were barred by the Statutes of Limitations. (Section 2 of the Real Property Limitation Act, 1833, as amended by section 1 of the Real Property Limitation Act, 1874.)

The Commissioners of Charitable Donations and Bequests v. Wybrants (2 J. & Lat. 182) not followed. *Hughes v. Coles* (27 Ch. D. 231) disapproved of.

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QUESTION arising on allocation.

Urith Paul, a predecessor in title of the vendor, died in 1811, having made her will with four codicils thereto, whereby she devised certain lands, including the lands sold in this matter, known as the Kildare estate, to trustees and their heirs, to hold upon the trusts and to the uses therein declared. By the third codicil testatrix directed as follows:—"I desire that all my yearly subscriptions to the New Ross and Waterford charities be for ever continued—the Waterford to be paid out of that part of my estate bequeathed to the Wallaces." In the fourth codicil testatrix stated as follows:—"The like subscriptions be for ever paid out of my county Kildare to my several Waterford charitable institutions."

By a report of a Master in Chancery, made in the suit of *Deane v. Glascock*, which was instituted to administer the estate of the deceased, it was found as follows:—"I find that the said Urith Paul did, by her codicil, direct that subscriptions to the several Waterford charitable institutions should be for ever continued out of her county Kildare estate, and I find that the said subscriptions are as follows, that is to say—to the Sick Poor Institution, £5 13s. 9d. yearly; to the Fever Hospital or Home of Recovery, £4 11s. yearly; to the School for Industrious Poor, Waterford, £2 5s. 6d. yearly; to the Poor School Breakfast Fund, 11s. 4½d. yearly; and to the Lying-in Hospital, Waterford, £1 2s. 9d. yearly; and are perpetual charges on the said lands in the county Kildare." The said report was duly confirmed.

From the affidavit of J. G. Alcorn, one of the secretaries to the Commissioners of Charitable Donations and Bequests, it appeared that the annuity of £5 13s. 9d. was regularly paid up to the 4th

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February, 1869, but had not since been paid; that the annuity of £4 11s. was paid up to the year 1861, but had not since been paid; and that the annuity of 11s. 4½d. had not been paid for over twenty-five years. The Commissioners of Charitable Donations and Bequests now claimed that the above annuities were still subsisting, and were good charitable annuities, and should be redeemed.

George C. Green, K.C., for the Commissioners of Charitable Donations and Bequests.

G. F. Brunskill, for the vendor.

Nov. 3.

WYLIE, J.:—

In this case a question has been raised as to whether certain charitable annuities are barred under the statute.

It is admitted that nothing has been paid on foot of them for twenty-five years, and also that they would be barred unless they are secured by an express trust.

I have been referred to my decision in *Boyce's Estate* (1). I have again read my judgment in that case, and it is clear that it

(1) The judgment in *Boyce's Estate* was as follows:—

WYLIE, J.:—

In this case the Commissioners of Charitable Donations and Bequests have filed an objection to the final schedule, claiming to be entitled to payment, out of the lands sold, of two perpetual annuities of £5 and £3, under the will of John Boyce (the elder), who died about the year 1829 or 1830. The vendor alleges that the claim is barred by the Statute of Limitations. The only ground apparently put forward in the objection as an answer to this alleged bar by statute is an allegation that part payment was made up to the present time by John Boyce (the younger) out of other lands subject to the annuities; but it is now admitted that this allegation is incorrect, and that no payment has been made or acknowledgment given in respect of those annuities for more than twenty years; and the point relied upon by counsel for the Charitable Commissioners in argument was that the annuities were secured by an express trust, and that therefore the Statutes of Limitations did not apply.

Now, by his will, dated the 20th October, 1829, John Boyce (the elder) devised certain lands (including the lands sold herein) to Anthony Chearnley and Edward Roche, their heirs and assigns, to have and to hold to, for, and

covers this case. In point of fact, this case is stronger in favour of the charities, inasmuch as, apart from the fact of the annuities being charitable, the existence of an express trust appears more clearly on the face of the will. The legal fee is, I think, clearly in the trustees, and one of the trusts is to pay the annuities. Further, the annuities are directed to be paid out of the lands. I, accordingly, hold that they are not barred; but, as in the case of *Boyce's Estate*, I decide that the arrears are barred.

J. E. W.

upon the several uses, trusts, intents, and purposes thereafter mentioned, expressed, and contained of and concerning the same. He then proceeds to bequeath a large number of annuities and legacies, all mixed up in no particular order, and amongst the annuities is a bequest of £5 for ever to the Dispensary of Tallow, and £3 for ever to the Dispensary of Rathcarmick, which annuities are the subject of the present claim. He charges all the legacies and annuities on the lands devised, directs the payment of the several legacies within twelve months after his death, and further on in the will directs the general pecuniary legacies to be paid primarily out of his money in the public funds and other personal estate, which of course means, to be paid by his executors. He gives expressly to all the annuitants a power of distress in case of non-payment. He then imposes upon the trustees an express trust to pay the head-rents payable out of his several estates, and then, by direct devise and bequest, he gives the lands, subject and always liable to the payment of the several annuities and legacies to several persons and their issue in succession, by way of contingent devise over, each tenant for life to be without impeachment for waste, and in terms showing that each owner was to be in receipt of the rents, issues, and profits of the lands.

Taking, therefore, the will as a whole, if these annuities were bequeathed to a private person and not to a charity, I would be of opinion that there was no express trust created by the will of John Boyce in respect of them; but, being charitable gifts, charged upon and payable out of the lands devised, I think I am bound by the decision of the Lord Chancellor in *Commissioners of Charitable Donations and Bequests v. Wybrants* (2 J. & Lat. at p. 198) to hold that the persons taking those lands under the will took them subject to an express trust to pay those annuities; and this being so, they are not affected by any Statute of Limitations, except so far as section 10 of the Act of 1874 may apply to them.

Now, the effect of this section in the case of rent or annuity, the subject of an express trust, has been decided in the case of *Hughes v. Coles* (27 Ch. D. 231), where Kay, J., held that after the statutory period had run, the statute barred all claim to arrears, but not the right to future gales. The correctness of this decision as regards arrears is questioned in a well-known text-book,

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The vendor appealed (1).

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Estate.

Brunskill, for the appellant :—

Dec. 8, 9, 21.

Wylie, J., decided this case on the strength of Sir Edward Sugden's dictum in *The Commissioners of Charitable Donations and Bequests v. Wybrants* (2), to the effect that where a testator gives an estate to one subject to a charge of annuities in favour of a charity, the devisee is impressed with the character of a trustee for a charity. This dictum, however, was not necessary for the decision of that case, and is not supported by the current of modern authorities. What must be found in a will in order to bring the case under the 25th section was laid down by Lord Cairns in *Cunningham v. Foot* (3), where he said—"The land must be vested in a trustee upon an express trust, and then the right of the *cestui que trust* to bring an action is served in the manner pointed out by the 25th section. There must be a trustee in whom the land is vested; there must be an "express trust," by which I understand the Legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience, a trust arising upon the words of the instrument itself. Therefore, these three things must concur: there must be land; there must be the trustee of the land;

and doubted by the Master of the Rolls in *Dower v. Dower* (15 L. R. Ir. at p. 275); but that was not a similar case, and the decision, as far as I know, has not been overruled.

As far as I can understand the decision, the learned Judge seems to have held that a rent or annuity, not being a "sum of money or legacy" charged on land, was not hit by the first part of the section, but that arrears of rent are expressly within the second part of the section, and that, as neither the rent nor any arrears could be recovered after the lapse of twelve years if there was no express trust, the second part of the section barred all arrears, even where there was an express trust. That decision, whether right or wrong, applies to this case, and, following it in its entirety, I hold that all arrears of these two annuities are barred, but that claimants are entitled to all future gales.

(1) In the Court of Appeal, before PALLIS, C.B., and FITZGIBBON and HOLMES, L.JJ.

(2) 2 J. & Lat. 182, at p. 198.

(3) 3 A. C. 974, at p. 984.

and there must be the *cestui que trust* for whose benefit in this respect the land is to be held, and all that must be found upon the construction of the instrument with which you have to deal."

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Again, at p. 992, Lord O'Hagan said—"Such a trust must be created *eo nomine*, or by the gift to the trustee of property, not merely charged with or subject to a payment, but so dedicated by clear and distinct words as to fix on the trustee a fiduciary obligation to apply it for that special purpose." Here there is no express trust for the payment of the charitable annuities; there is no active duty imposed on the trustees to pay them. The direction that they are to be paid out of the Kildare estate simply made them a charge on the lands in the hands of the person for the time being beneficially entitled thereto, and did not create an express trust: *Francis v. Grover* (1); *Hodge v. Churchward* (2).

Even if the will could be held to have created an express trust in favour of the annuities, any claim in respect of the latter is, nevertheless, now barred by section 10 of the Real Property Limitation Act, 1874. *Hughes v. Coles* (3), relied on by the other side, was wrongly decided; the question as to whether an annuity secured by an express trust was within the first part of that section was not there argued, it being assumed that the annuity was still subsisting, and that future gales could not be barred. *Hughes v. Coles* (3) was disapproved of by Porter, M.R., in *Dower v. Bower* (4), and should not now be followed. See also Banning's Limitation of Actions, 1906 ed., p. 196. Section 10 in terms applies to a legacy charged upon or payable out of any land, and secured by an express trust, and such a legacy includes the annuities here in question, which are, therefore, barred: *Ward v. Grey* (5); *Re Ashwell's Will* (6).

G. C. Green, K.C., and Pigot, for the respondents:—

We contend that the annuities here in question were secured by an express trust, and that the operation by the Statutes of Limitations was, therefore, excluded by section 25 of the Real

(1) 5 Hare, 39.

(2) 16 Sim. 71.

(3) 27 Ch. D. 231.

(4) 15 L. R. Ir. 264.

(5) 26 Beav. 485.

(6) Johns. 112.

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Property Limitation Act, 1833. It is clear that the Statute of Uses did not operate to execute the uses in the beneficiaries, and that the legal estate in the lands remained vested in the trustees, who had active duties to perform, *e.g.*, to sell the lands, to make allowances to minors, and to raise legacies. A conveyance from the trustees would have been necessary to vest the legal estate in the beneficiaries. This case is, accordingly, ruled by the decision in *The Commissioners of Charitable Donations and Bequests v. Wybrants* (1). There a testator devised lands to trustees upon trust to convey the same to one for life, charged with four annuities, payable to charitable institutions (the testator not saying by whom the annuities so charged were to be paid), with remainders in tail, subject to annuities. Sir Edward Sugden there held that if the trust to convey was to be considered as still in existence, the provision for the annuities to charities was an express trust within section 25, and, further, following *Bailey v. Ekins* (2), that if the devisees of the beneficial interest in the lands had acquired the legal estate, subject to the charge, there was still an express trust binding upon them in favour of the charities. Assuming that these annuities are secured by an express trust, they are not affected by section 10 of the Real Property Limitation Act, 1874. Section 25 of the Act of 1833 only applies in terms to land or rent, and not to charges thereon, which would come within the provisions of the 40th and 42nd sections of the same Act; but it was held that a similar exception existed under section 25 in favour of such charges when secured by an express trust. See Darley and Bosanquet (1893 ed.), p. 428, and the cases there cited. It is submitted that section 10 of the Act of 1874 does not remove the protection afforded by section 25 of the Act of 1833 in the case of land or rent, rent including an annuity payable out of land under section 1 of the Act of 1833. The object of section 10 was not to repeal section 25, but to restrict its application to its proper subject-matter, *i.e.*, land or rent, section 10 dealing with "any sum of money or legacy charged upon, or payable out of, any land or rent," and "arrears of rent, or of interest in respect of any sum of money or legacy so charged

(1) 2 J. & Lat. 182.

(2) 7 Ves. 318.

or payable," *i.e.*, the subject-matter of sections 40 and 42 of the Act of 1833, and section 8 of the Act of 1874, and not that of sections 2 and 25 of the Act of 1833, and section 1 of the Act of 1874. In *Hughes v. Coles* (1), Kay, J., held that section 10 of the Act of 1874 did not destroy the right to recover any future payment of the annuity then in question, and in *Dower v. Dower* (2), Porter, M.R., although disapproving of the decision in *Hughes v. Coles* (1) held that the "present right to receive" an annuity arises *de anno in annum* as to each subsequent payment.

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Brunskill replied.

The judgment of PALLIS, C.B., who was unavoidably absent, was read by FITZ GIBBON, L.J., as follows:—

Dec. 21.

This is an appeal from an order of Mr. Justice Wylie, of the 3rd of November last, whereby, after stating that the Court was of opinion that the several claims referred to were not barred by the Statute of Limitations, he allowed the same, and ordered redemption thereof.

The claims referred to are certain annuities or periodical payments devised by the third and fourth codicils to the will of Urith Paul, dated the 10th of May, 1811. They are found by a report of the Master in Chancery, dated the 16th of June, 1819, in the Chancery suit of *Greene v. Glascott*, to consist of the following devises to existing institutions viz.:—To the Sick Poor Institution, Waterford, £5 13s. 9d. yearly; to the Fever Hospital or Home of Recovery, Waterford, £4 11s. yearly; to the School for Industrious Poor, Waterford, £2 5s. 6d. yearly; to the Poor School Breakfast Fund, Waterford, 11s. 4½d. yearly; and to the Lying-in Hospital, Waterford, £1 2s. 9d. yearly; making together £14s. 4s. 10½d. yearly.

By her will, Mrs. Paul devised certain lands, which have been sold in this matter, and which I shall call the Kildare estate, to certain trustees and their heirs, "subject to the annuities hereinafter mentioned," which, however, do not include those which are the subject of the present appeal, upon trust to

(1) 27 Ch. D. 231.

(2) 15 L. R. Ir. 264.

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permit and suffer one George Drake to take the rents thereof for his life, with remainder upon trust and to the use of his first and other sons in tail male, with remainder to his daughters in tail general, with certain limitations not material to be stated, all of which are in terms which, were there nothing else in the will, would execute the uses in the beneficiaries. The will then devised certain annuities, and incumbered with them the lands of Timolin and Portersize, parts of the Kildare estate, and also bequeathed several legacies, some of which were revoked by a codicil, and directed her trustees to raise the amount of such legacies, and also a sum of £3000 for the erection of a mansion-house, by a sale of timber on the lands of Stokestown; and in case of any deficiency, to levy such deficiency by a sale or mortgage of a competent part of her other property, the lands in the county of Kildare to be first resorted to after the sale of the timber.

By the first codicil to her will she bequeathed to her executors and trustees £1500, to be raised as her other legacies, upon certain trusts unnecessary to be stated.

By the third codicil to her will the testatrix desired that all her yearly subscriptions to the Ross and Waterford charities should be for ever continued—the Waterford charities, which comprise those in question here, *to be paid out of the part of her estate bequeathed* to the Wallaces, which I understand includes the Kildare estate, and the Ross charities to be paid out of the demesne of Stokestown; and by her fourth codicil she directed that her Stokestown estate “should for ever continue her subscription to the several Ross charitable institutions, and that the like institutions”—(a word which, it is agreed, and indeed seems to have been found by the report to which I have already referred, was a mistake for, and should be read as, “subscriptions”) “be for ever paid out of my county Kildare to my several Waterford charitable institutions.”

The question is, whether these charitable perpetual subscriptions, periodical payments, or annuities, however they may be called, are, or are not, barred by the Statutes of Limitations, no payment having been made on account of them for a period much exceeding twelve years before the institution of this matter

in the Land Commission Court? Mr. Justice Wylie held that they were not, being of opinion that the effect of the will and codicil was to create a trust for their payment, within the meaning of section 25 of 3 & 4 Wm. 4, c. 27, and based his judgment upon the decision of Lord St. Leonards in *The Commissioners of Charitable Donations and Bequests v. Wybrants* (1). I am willing to treat the case as if the legal estate in the fee were in the trustees; indeed, I think the trust to raise the legacies renders it necessary they should have the legal estate. The devise in *Wybrants' Case* (1) was one of lands to trustees and their heirs, upon trust to grant and convey the same to one for life, subject nevertheless to, and charged with, four annuities, three of which were to be paid to three different charitable institutions, two of them being corporate bodies, and the fourth to the poor of a parish; and the testator directed those annuities to be paid, not saying by whom, and expressly charged his estate with them. Lord St. Leonards there said:—

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“It was considered throughout the argument, that the legal estate was still in the trustees, no legal conveyance ever having been executed. Is, then, the provision for the annuities to charities an express trust within section 25? It certainly is so if the trust to convey is to be considered as still in existence: for the conveyance can only be properly made by securing the annuities; and the trustees have a power of leasing; and there is a direction to pay the annuities which would apply to the trustees. They are trustees for the trusts declared until they convey; and these are all express trusts.”

Lord St. Leonards then proceeds to state that if the devisees of the beneficial interest had acquired the legal estate subject to the charge, he should still be of opinion in favour of the charities:—

“In the first place, the devisees must be considered to have acquired the legal estate from the trustees; and if not, yet the charge for the charities would, I think, create what in this Court must be deemed an express trust within section 25. The gift is an express one, and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust. It certainly is not necessary to use the word ‘trust’ in order to create an express trust. I do not intend to lay

(1) 2 J. & Lat. 182.

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it down that every charge creates a trust, although it imposes a burden; but a charge *may* create a trust, depending on the nature of the charge. In *Bailey v. Ekins* (7 Ves. 323) Lord Eldon said he was confident Lord Thurlow's opinion was that a charge (of debts) is a devise of the estate, in substance and effect, *pro tanto*, upon trust to pay the debts; and this is supported by the current of authorities."

Then follow these words, which are those that have been principally relied upon—

"The principle is no less powerful in the case of charities, particularly where the charity is to a fluctuating, uncertain body, like the poor of a parish. The testator gives the estate to one, subject to this charge. Who is to pay the annuities but the person who is liable to the burden; and this, in the case of a charity, impresses him with the character of a trustee for the charity."

The first ground of this judgment distinguishes it from the present case. "It certainly is so, if the trust to convey is to be considered as still in existence: for the conveyance can only be properly made by securing the annuities." Further, in that case the will was read as directing the trustees to pay. Here it is the estate which is to pay. But even were this otherwise, the current of subsequent authorities is, I think, so strong as to prevent us from recognizing this second ground of his decision as law, notwithstanding the eminence of the Lord Chancellor who decided it. It seems now to be perfectly settled that a charge, *simpliciter*, does not create a trust; and if that be so when the estate subject to the charge is devised directly to a beneficiary without the intervention of a trustee, it is hard to see how the mere fact of the charge being upon an estate which is vested in a trustee can necessarily have any greater effect. The question is the existence, not of *any* trust, but of a trust for payment of the charge.

In *Hodge v. Churchward* (1) it was decided that a devise to pay a sum to a specified person was not a trust for that person.

In *Francis v. Grover* (2), decided in 1845, and ever since held unquestioned law, the annuity was not only charged upon the estate, but that estate was devised to trustees subject to the

(1) 16 Sim. 71.

(2) 5 Hare, 39.

charge. The question there arose upon section 42 of the Statute of Limitations of 1833.

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"The present case" (says the Vice-Chancellor, at p. 49) "is one of land devised to a person, not upon trust, but subject to and chargeable with an annuity; and the question is, whether the beneficial owner of an estate charged with the payment of an annuity under a will is a direct trustee, so that the annuitant, though making no claim for twenty years, can afterwards claim the whole arrears. If there be a devise to trustees in trust to pay an annuity, and no purchase for value intervening, the 25th section will govern the case. But this is a devise of land to a person beneficially, subject to a charge. . . . Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised, charged with the payment of the annuity, my opinion is that that is not a case of express trust within the 25th section of the statute. It is a bequest or devise which creates a liability in favour of the annuitant, but it does not impose any fiduciary character upon the devisee."

In *Cunningham v. Foot* (1) there was a devise of an annuity to the testator's widow, payable out of the profits of his business, and out of all profits of every part of his estate and property. The testator directed his three eldest sons, Lundy, James, and Simon, to manage his business, and he bequeathed to them all the property of every sort then employed by him in carrying on his business; and he devised lands called Seskin Ryan, after the death of his wife, to his eldest son, and ground rents to his sons James and Simon; and directed that those bequests should stand good only on condition of well and truly paying the several legacies, and discharging with fidelity the different trusts of the will committed to them. It was held that, upon that will, there was no trust, within the 25th section, for the payment of the annuity to the widow. Lord Cairns says (p. 989):—

"Is this an express trust of the land of Seskin Ryan for the purpose of paying the annuity? I apprehend that it is not."

And after referring to *Hodge v. Churchward* (2), the decision in which, he said, had always been followed, and never quarrelled with since, he proceeded—

(1) 3 App. Cas. 974.

(2) 16 Sim. 71.

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"The word 'pay' surely cannot mean more than the words 'well and truly pay'; and the words 'well and truly pay' must mean simply on condition of well and truly paying; and therefore, it being established law that a devise to A, 'paying' a sum of money to B, is not a trust, but is a charge, it must also be the law that a devise to A 'to well and truly pay' to B is not a trust, but is a charge; and a devise to A, 'on the condition of well and truly paying,' must be a charge and not a trust. Therefore, . . . there is here a devise of the remainder of Seskin Ryan to the son, *at the utmost charged* with the condition of paying the annuity, that is to say, the arrears of the annuity, to the widow."

Therefore, notwithstanding my opinion that under the will here the legal estate in fee has been vested in the trustees, I hold that the direction that the subscriptions to the several Waterford charitable institutions should for ever be continued out of the testatrix's County Kildare estate was insufficient to create a trust for their payment, unless some distinction is to be drawn upon the ground that the annuities are dedicated to charitable purposes. It being clear that charities are within the statute 3 & 4 Wm. 4, I am unable to see how this distinction can make any difference where, as here, the annuities are granted to charitable institutions specified in the will. I can see that a distinction might exist in the case of a devise to "poor persons" to be selected by the devisee, or where the devise casts upon the devisee the duty of seeing to the application of the annuities to the specified charitable purposes. Further than that I cannot see any distinction. I have to add that the decision of Lord St. Leonards in *Wybrants' Case* (1) held that none of the four annuities was barred, and of these one was not a charity. That case is therefore not an authority that there is any exception in favour of charities.

I am therefore of opinion that these annuities are not protected by the 25th section.

Under these circumstances, no elaborate discussion of the cases cited is necessary to show that these charges are barred. In my opinion, the case is within section 2 of the Act of 1833, and section 1 of that of 1874, and not within section 40 of the earlier, or section 8 of the later, Act. This was the decision of the late Master of the Rolls, Sir Andrew Porter, in which I agree, in

(1) 2 J. & Lat. 182.

Dower v. Dower (1). In reference, however, to the report of that case, I should like to say that the marginal note is in direct antagonism to the decision. The marginal note is that "an annuity given by will and charged on all the testator's real and personal estate is within 37 & 38 Vict. c. 57, s. 8, and is barred by non-payment of the gales for twelve years." The actual decision was, that the annuity was not within section 8, but was within section 1, of that Act, and for *that reason* was barred. The importance of this distinction is, that cases within section 1 of the later Act, or section 2 of the earlier one, are entitled to the benefit of section 25 of the former Act.

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I am aware that this view is not consistent with the judgment of Kay, J., in *Hughes v. Coles* (2), who applied section 10 of the Act of 1874 to a case within section 1. As to that, I can only say that if this was the basis of his decision, it ought to have been, not only that the arrears were barred, but that the annuity was extinguished; but it appears from the statement of the facts in page 233 that it was admitted that the annuity was a subsisting one; and that could only have been by section 10 being inapplicable to cases within section 1. I cannot regard that case as a satisfactory authority.

Upon the whole, I am of opinion that the claims are barred by section 1 of the Act of 1874, and that consequently the order of Wylie, J., ought to be reversed.

FITZGIBBON, L. J. :—

On reading the Lord Chief Baron's judgment, in which I concur, I felt it unnecessary to write a judgment, and I desire only to supplement what he has said.

The testatrix appears to have been given to drafting her own testamentary instruments. The will devised her lands subject to "annuities" *eo nomine*. The only descriptive term under which the claims now in controversy can be sustained is "yearly subscriptions" in the third codicil, of which the fourth codicil is mainly a repetition.

(1) 15 L. R. Ir. 264.

(2) 27 Ch. D. 231.

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The definition of "rent" in the Act of 1833, section 1, is very wide:—

"The word 'rent' shall extend to (*inter alia*) all annuities and periodical sums of money charged upon or payable out of any land."

These yearly subscriptions are payable out of land. The source from which their payment is provided is land. The testatrix did not say who was to make the payment, but the Charities could look to the land, and enforce payment out of it against whoever was in possession of it, not under any trust, but as incumbrancers.

I find it hard to say that what Lord St. Leonards in *Wybrants' Case* (1) held to be an express trust, was more than an implied trust, or even that it was a trust at all.

The Act of 1833, section 25, says:—

"When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration."

The terms of this provision seem to me to contemplate, as essential to the creation of an "express trust," the identification of a trust and of a *cestui que trust*; the trust, if it exists, must be one which can be enforced by a defined *cestui que trust* against a declared trustee.

The Act of 1874, section 10, uses the words "charged upon or payable out of any land or rent, at law or in equity" after, and so as to qualify, the words "any legacy," whereas in section 8 of that Act, and in section 40 of the Act of 1833, these words occur *before* "any legacy"; and section 10 further qualifies "any legacy" by the words "secured by an express trust."

It seems to me clear that, to constitute a security by "an express trust" under section 10, there must be something tantamount to a limitation of the land which will charge the legacy, or

(1) 2 J. & Lat. 182.

make it payable upon or out of the land by way of trust; and that an express trust cannot be inferred from or spelled out of doubtful expressions.

The contention in *Cunningham v. Foot* (1) was that an express trust had been created, and the question which the House of Lords answered in the negative was whether the relation of trustee and *cestui que trust* was created by the terms of the will. I think that there was much more to be said in favour of the existence of an express trust in that case than here. The words in *Cunningham v. Foot* (1) were:—

“ I will order and direct that all the said bequests shall stand and hold good to them, Lundy, James, and Simon, only on condition of well and truly paying the several legacies herein directed, *and discharging with fidelity the different trusts by this will committed to them.*”

HOLMES, L.J., concurred in the judgment of PALLES, C.B.

Solicitor for the vendor: *T. T. L. Overend.*

Solicitor for the Commissioners of Charitable Donations and Bequests: *John Maxwell.*

R. ST. J. C.

(1) 3 App. Cas. 974.

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Wylie, J. IN THE MATTER OF THE ESTATE OF MARTHA E. A.
 1909. TYRRELL, MARY ARABELLA WEBB, AND ANNA
 March 9, 11. M. JOLY, OWNERS; JAMES W. BOND, PETITIONER.

Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 7—Sale under provisions of—One of co-owners of estate tenant-purchaser of portion—Section 3 (2)—Section 48 (2)—Bonus.

Three co-owners were entitled, in undivided shares, to an estate for their respective lives in certain lands, which were subject to an absolute order for sale. The Estates Commissioners made an offer to purchase the said lands from the Land Judge. In the schedule to the offer one of the co-owners, who held portion of the said lands as tenant from year to year under the Land Judge, was set out as tenant, and portion of the price put down in the offer for that holding was to be advanced under the Land Purchase Acts. The Estates Commissioners' offer for the entire lands on the basis of the prices in the schedule was duly accepted by the Land Judge, and the Estates Commissioners were declared the purchasers:—

Held, that no part of the advance was for the price of "land resold to the vendor of an estate" within the meaning of sect. 48 (2) of the Irish Land Act, 1903, and, accordingly, that the bonus was payable in respect of the entire advance.

APPLICATION by the petitioner having carriage for an order declaring that the percentage specified in section 48 of the Irish Land Act, 1903, was payable in respect of the amount of the purchase-money advanced in respect of the lands comprised in the estate sold in this matter.

The facts on which the question arose, as appearing from the Judgment of *Wylie, J.*, were as follows:—

The estate purchased by the Estates Commissioners consisted of part of the lands of Corbetstown, and, as set forth in the schedule to the Estates Commissioners' offer, comprised 569A. 3R. 14P. of tenanted land, and 88A. 3R. of untenanted land. In the schedule of tenanted land Martha E. A. Tyrrell was set out as tenant of 286A. 0R. 10P., at a rent of £146 6s. 9d. a-year, and the price put down in the offer for that holding was £3051, of which £3000

was to be advanced by the Estates Commissioners, and £51 was to be paid in cash by the tenant. The usual undertaking to purchase, signed by Martha E. A. Tyrrell, was duly lodged. The Estates Commissioners' offer for the entire estate on the basis of the prices in the schedule was accepted by the Land Judge, and the Estates Commissioners were declared the purchasers on the 30th October, 1908. Martha E. A. Tyrrell first became tenant of the above holding under a lease made to her in 1883 by J. R. Joly and his wife, who were then owners of the estate. It appeared from an order in the Vice-Chancellor's Court made in July, 1893, in a suit in which Anna Maria Joly was plaintiff, and Martha E. A. Tyrrell and others were defendants, that, by virtue of a settlement made in 1849 and an appointment made in 1888, the lands comprised in this estate became vested in Martha E. A. Tyrrell, Mary Arabella Webb, and Anna Maria Joly in equal thirds for their respective lives, with a right of survivorship between the two latter as to their respective third shares, and subject to these life estates, one-half became vested in Martha E. A. Tyrrell, and one-fourth each in Mary Arabella Webb and Anna Maria Joly, respectively, as in default of appointment. In May, 1903, J. W. Bond presented a petition to the Land Judge, in which Martha E. A. Tyrrell, Mary Arabella Webb, and Anna Maria Joly were named as owners, for sale of the lands to discharge incumbrances, and an absolute order for sale was made on the 12th October, 1903. In August, 1904, the rent payable by Martha E. A. Tyrrell having fallen into arrear, an ejectment for non-payment of rent was brought against her by direction of the Land Judge, and she was evicted from the holding, but, subsequently, pursuant to the terms of a consent and the payment by her of a sum for arrears of rent and costs, she was, by order of the Land Judge, dated 12th December, 1905, reinstated in her holding at a rent of £146 6s. 9d. as tenant from year to year and otherwise under the terms of the evicted lease. The plaintiff in that suit was William J. H. Tyrrell, the surviving trustee of the settlement of 1849.

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R. H. Macrory, in support of the application :—

The bonus is payable unless the case comes within the exception mentioned in section 48 (2). The Land Commission can only pur-

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chase for the purpose of re-sale either to the tenants or, under section 3, to the owner. As far as the Land Commission is concerned the re-sale here was to Mrs. Tyrrell as "tenant," and not as "former owner." This is made clear from the form of the offer. If the re-sale was made to her as "former owner," the amount advanced exceeded the limit mentioned in section 3 (2). The advance is not divisible for the purpose of the bonus: *Minhear's Estate* (1). The three co-owners here constitute the composite vendor. If they cannot be separated for the benefits of the Act, they cannot be separated for its exceptions.

Serjeant O'Connor, K.C., for the Treasury :—

The question is, was any of the land comprised in the estate re-sold to the vendors, or any of them? If so, then *qua* the land so re-sold no bonus is payable. Section 48 (2) applies to all cases of re-sale within section 3 (2). In the case of a sale by the Land Judge "former owner" in sect. 3 (2) is the same as "vendor" within the meaning of section 48 (2), and the terms are interchangeable. The fact that Mrs. Tyrrell was not absolute owner does not deprive the sub-section of its effect. Mrs. Tyrrell was, no doubt, tenant of the entire land, but she is also owner of an undivided share. That share has been sold to the Land Commission, and she has bought back an undivided share in reversion in her tenancy, and *qua* this share no bonus is payable. It is not correct to say that the limit of advance has been exceeded, as the entire purchase-money advanced does not come back to Mrs. Tyrrell.

FitzGibbon, K.C., for the co-owners :—

A re-sale implies a sale to the party who was, or parties who made up, the "former owner" of the estate. Mrs. Tyrrell is vendor only as to an undivided third. If no bonus is paid in respect of the advance for her holding, her two competent co-vendors are deprived of their share of the bonus.

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In this case a question has been raised, whether the bonus is payable upon the entire purchase-money of the estate purchased by the Estates Commissioners from the Land Judge, or whether the purchase-money for the purpose of calculating bonus is to be reduced by the price of a portion of the lands alleged to be re-sold by the Estates Commissioners to one of the owners of the estate. [His Lordship stated the facts as above set out.]

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March 11.

I assume that Mr. J. H. Tyrrell, the surviving trustee of the settlement of 1849, was the legal landlord of Mrs. Tyrrell's holding in respect of her tenancy at the time of her eviction. Now, having regard to the facts, as already stated, and to the terms of the proposal for purchase made by the Estates Commissioners, and accepted by the Land Judge, and to the agreement or undertaking to purchase signed by Mrs. Tyrrell, there can, I think, be no question that the Estates Commissioners sold to Mrs. Tyrrell as tenant and not as owner. Under these circumstances, what is the law as to the bonus?

It is admitted by Serjeant O'Connor, on behalf of the Treasury, that the bonus is payable in this case at 12 per cent. on the entire purchase-money advanced by the Estates Commissioners unless sub-section 2 of section 48 applies to the case. That sub-section provides that "in estimating the amount of the purchase-money on which the percentage is to be payable, the price of any land resold to the vendor of an estate shall be excluded." Of course, technically, in this case the vendor is the Land Judge, but I think it may be taken, as contended for by Serjeant O'Connor, that this sub-section applies to all cases of re-sales within section 3, sub-section 2, of the Act, and that, in the case of the sale by the Land Judge, the former owner of the estate is the vendor within the meaning of sub-section 2 of section 48. That "vendor" and "former owner" are in such a case interchangeable appears, I think, also from section 53, sub-section 2. It is admitted by both sides, and I think properly, that sub-section 2 of section 48 must be read with section 3, and is controlled by it; and, I think, so reading it, it must be admitted that any part of the purchase-money of an estate that is advanced under sub-section 2 of section 3 is not subject to bonus. Therefore, the question is, was the £3000

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advanced in this case to Mrs. Tyrrell for the purchase of her holding, or any part of it, advanced under sub-section 2 of section 3?

It seems to me that this is the only test that can be applied. Certainly, in point of fact, no part of the £3000 was advanced to Mrs. Tyrrell as owner or vendor under sub-section 2 of section 3. It was all undoubtedly advanced to her as an ordinary tenant of the holding. She was dealt with as such tenant both by the Land Judge and by the Estates Commissioners.

Is there anything then in section 3 or section 48, sub-section 2, to make any part of this advance, in point of law, an advance under section 3, sub-section 2? Now, on the facts of this case, could this holding have been re-sold to the vendor or owner under section 3? Treating vendor and owner as synonymous in this case, who was the vendor? Under the Land Purchase Acts, in conjunction with the Settled Land Acts, there can be no doubt that the three tenants for life together constitute the vendor. Could then the Estates Commissioners, under section 3, sell this holding, or any part of it, to the three tenants for life? Certainly not, unless Mrs. Tyrrell's tenancy was surrendered, because she had a valid tenancy in the whole of it binding on the fee. She paid the arrears of rent and costs to the Receiver, and was bound also to pay him the future rent after reinstatement. As such tenant she was entitled to buy, and the Estates Commissioners were entitled to sell to her, and they exercised those rights. She had no idea of surrendering her tenancy in any part of the holding. This is not a case in which it could be suggested that she occupied one undivided third as owner, and two undivided thirds as tenant to her co-owners. She was in occupation of the whole as tenant and nothing else.

It seems to me, therefore, that no part of the advance in this case was for the price of land re-sold to the vendor of an estate within the meaning of section 48, sub-section 2; and the entire advance is accordingly a subject-matter for bonus at 12 per cent.

Solicitors having carriage : *S. S. & E. Reeres & Son.*

Solicitor for the Treasury : *W. G. Towers.*

Solicitors for the co-owners : *T. T. Mccredy & Son.*

IN THE MATTER OF THE ESTATE OF THE RIGHT HON.
WILLIAM SPENCER, VISCOUNT ASHBROOK, CON-
TINUED IN THE NAME OF THE RIGHT HON. ROBERT
THOMAS FLOWER, VISCOUNT ASHBROOK.

Wyke, J.
1909.
Jan. 12, 18.
—
Appeal.
April 19.

*Settled land—Death of tenant for life—Rights of his executor—Sale to tenants
—Arrears of rent due at date of agreements for purchase—Interest on—
Land Law (Ireland) Act, 1896, s. 35, sub-s. 2—Irish Land Act, 1903,
s. 24, sub-s. 8.*

Where, upon the sale of a settled estate through the Irish Land Commission, arrears of rent are due to the tenant for life at the date of the purchase agreements, in the event of his death before allocation his personal representative is entitled to the interest on the sum payable in respect of those arrears under section 24, sub-section 8, of the Irish Land Act, 1903.

MOTION on behalf of the Honourable Caroline Gertrude Marton as executrix of the late William Spencer, Viscount Ashbrook, deceased, that she be declared entitled as such executrix to interest on the part of the purchase-money which represented in amount the equivalent of so much of the arrears of rent due to her as such executrix as would be payable under section 24, sub-section 8, of the Irish Land Act, 1903.

The Right Hon. William Spencer, Viscount Ashbrook, who was tenant for life of considerable estates in the counties of Limerick and Kilkenny and Queen's County, agreed with certain of the tenants under the provisions of the Irish Land Act, 1903, for the sale to them of their holdings; and it was alleged that arrears of rent amounting to £5171 5s. 6d. were added to the purchase-money. The amount of the arrears was not, however, within the knowledge of the applicant or her solicitor; but it was a common case that some arrears were due at the date of the agreements. The vendor duly filed an originating application, and lodged the purchase agreements with the Land Commission. The said William Spencer, Viscount Ashbrook, died on the 25th November, 1906. Probate of his will was granted to the appli-

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1909.
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cant as executrix on the 16th August, 1907. He was succeeded by the Right Hon. Robert Thomas Flower in the title and as next tenant for life of the estates. The lands had not yet been vested.

Matheson, K.C., and *W. G. Gibson*, for the applicant.

Corvan, for the Right Hon. Robert Thomas Flower, present Viscount Ashbrook.

The arguments were the same as reported *infra*, pp. 164, 165, in the Court of Appeal.

Cur. adv. vult.

Jan. 18.

WYLIE, J. :—

In this case a rather curious and difficult question has been raised, as to the meaning and effect of sub-section 8 of section 24 of the Irish Land Act, 1903. The facts are not in dispute, and are shortly as follows :—

The late Lord Ashbrook, as tenant for life of certain settled lands, entered into agreements with the tenants thereof, for the sale to them of their respective holdings under the Act of 1903, at certain fixed prices, the amount whereof in each case included a certain sum for arrears of rent then due to the vendor. The vendor duly filed an originating application, and lodged these agreements with the Land Commission. Each of these agreements contained an application by the tenant purchaser to the Land Commission, for an advance of the purchase-money, including the amount added for arrears, and also a provision for payment of interest at a specified rate on such purchase-money from the date of the agreement. The tenant purchasers have since paid the interest in lieu of rent to the Land Commission in accordance with the provisions of section 35 of the Act of 1896. The vendor died on the 25th November, 1906, and thereupon the present Lord Ashbrook became entitled to the said lands as tenant for life. Prior to the death of the late vendor, the Land Commission paid the interest in lieu of rent collected by them to Mr. Fitz Herbert, the then agent of the vendor, and he accounted for same to the late Lord Ashbrook, and to his executrix after his death for his proportion up to the date of his death. The present

Lord Ashbrook dismissed Mr. Fitz Herbert from the agency, and appointed in his place Mr. James Harte, Solicitor, Kilkenny, to whom all interest in lieu of rent has since been paid, and he has accounted for the entire thereof to the present tenant for life. The Hon. Mrs. Marton, as executrix of the late vendor, now claims that, as such executrix, she is entitled to be paid so much of the interest in lieu of rent as is paid in respect of that portion of the purchase-money which is made payable to the vendor by sect. 24, sub-sect. 8, as representing arrears of rent due to him at the date of the agreements for sale. She has accordingly applied for an order staying the payment of interest to the present tenant for life until the proportion of interest claimed by her is ascertained, and for payment of same to her when ascertained.

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Now the validity of that claim depends on the meaning and effect of section 24, sub-sect. 8. That sub-section provides that "in case of the sale of an estate, where—at the date of the agreement—arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use."

Up to the present, as far as I know, no question has ever been raised as to the proper construction of that sub-section in relation to a claim for interest. In effect, though not in terms, it only applies where the estate sold is settled land, because if the vendor were owner in fee, there would not appear to be any reason for distinguishing that portion of the purchase-money representing added arrears from the rest of the purchase-money.

In dealing with this sub-section as applied to settled lands, it has been the unchallenged practice to place on the allocation schedule the claim under this sub-section in priority to all claims in respect of superior interests or incumbrances affecting the fee-simple; but, in ascertaining the amount payable in respect of such claim, there has always been deducted from the sum added for arrears all unpaid outgoings which would have been properly payable out of those arrears by the person entitled to receive them, because it is only the net balance so arrived at that such person would have been entitled to receive for *his own use*.

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Now, that practice is, I think, based on this assumption, that the sum added for arrears, though part of the purchase-money, continued by force of sub-section 8 to be the property of the person entitled to the arrears at the date of the agreement for sale, subject to such outgoings or charges as he was bound to pay out of them. That assumption, if correct, seems to me to have some bearing upon the question which I have now to decide. That question relates, not to the amount which would be payable on allocation out of the purchase-money in respect of this claim for added arrears under sub-section 8, but to the interest payable by the tenant purchasers upon that portion of the purchase-money, representing the added arrears, subsequent to the death of the late vendor.

If the assumption above referred to is correct, viz., that the added arrears, though part of the purchase-money, continued to be the property of the tenant for life, subject to all proper outgoings payable by him, it would seem to me to follow that the interest payable by the tenant-purchasers upon the added arrears, which was paid through the Land Commission to the vendor during his life, should, after his death, be paid to his executrix.

Now, is the above assumption correct? This again depends upon the meaning and effect of section 24, sub-section 8. No one, I think, will question that the main object of the Act of 1903 was to aid and facilitate the purchase of land in Ireland by occupying tenants, and that one of the main obstacles to land purchase under the previous legislation was the existence of arrears of rent which tenants were unable or unwilling to pay. Under the Acts of 1888 and 1896, an agreement for sale, if carried out, wiped out all liability for rent and arrears due at the date of the agreement; and, therefore, in any case where arrears existed which the tenant could not or would not pay, and the landlord could not or would not abandon, a sale could not take place. The practice, therefore, grew up of adding arrears to the purchase-money, so that the tenant-purchaser, instead of paying up the arrears prior to the sale, borrowed from the Land Commission a sum agreed upon to discharge the arrears, paid interest on that sum until after the advance, and repaid the advance by a purchase annuity. But a large proportion of the land in Ireland being in settlement, and

the vendor being only tenant for life, the addition of arrears to the purchase-money did not meet the difficulty in such cases, the effect being to make the added arrears the property of the remainderman, and the vendor only getting the interest upon it during his life. It seems to me, therefore, that sub-section 8 of section 24 was plainly intended to remedy this injustice, in the case of settled lands, by preserving the property of the tenant for life in the sum added for arrears, notwithstanding that by the agreement it is made part of the purchase-money. And the only equitable basis that I can conceive for the enactment contained in this sub-section is the assumption that arrears of rent due at the date of the agreement, which were the property of the tenant for life, were added to the purchase-money and were to remain his property and be paid to him on allocation.

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On the other hand, it is contended on behalf of the present tenant for life, that, though the executrix of the deceased tenant for life will, upon allocation, be entitled to be paid the specified amount of added arrears, she has no right or title, during the years that may elapse before allocation, to the interest payable on such arrears by the tenant-purchasers until the purchase annuity begins, and afterwards by the Land Commission until allocation, and that this interest, during said period, belongs to the present tenant for life though he has no claim whatever to the capital money representing such added arrears upon which such interest is paid. This would be a curious result, and the only argument advanced in support of it was substantially this, that sub-s. 8 should be construed as if it were in these words—"In case of the sale of an estate a specified sum shall, upon allocation, be paid out of the purchase-money to a specified person." But this not only introduces into the sub-section something that is not in it, viz., a specified time for payment, but it also omits its most material terms, viz., that the specified sum is only to be paid where arrears of rent were actually due out of the estate sold at the date of sale, and is to be paid to the person who was, at that date, entitled to those arrears, and the term implied by reference to the Act of 1896 that interest is payable upon those added arrears by virtue of the agreement for sale. When I speak of "added arrears," I mean that part of the purchase-money that represents the arrears

Wylie, J. added or assumed to be added and payable under the sub-section.
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Now, even if I had no authority to assist or guide me in construing sub-section 8, I would be of opinion, for the reasons already given, that the executrix in this case is entitled to the interest claimed; but on looking into the judgments in *Crosbie's Estate* (1) in the Court of Appeal, I find in each of those judgments a reference to this sub-section, which seems to me strongly to support my view. The Lord Chancellor at p. 130 says: "The object *prima facie* of that sub-section was to give an inducement to a tenant for life to sell, discharged of arrears by force of the agreement, by giving him a *charge* on the purchase-money for one year's arrears." At p. 133 FitzGibbon, L.J., says: "Meredith, J., was induced to hold that the effect of section 24, sub-section 8, was to legalize the addition of not more than one year's rent to the purchase-money. That sub-section has, to my mind, a very different effect: I regard it as an express recognition of the fact that the consideration for arrears of rent may enter into the calculation of the purchase-money, and the object of the section was to enable a limited owner to segregate from the purchase-money, after it had been fixed, a certain proportion which he might keep for himself, as a just recompense for having sold the arrears, which were his, with the holding in which he had only a limited interest"; and at p. 138 Holmes, L.J., after reading sub-sect. 8, says: "This provision is made in the interest of the limited owner entitled to arrears of rent at the date of the agreement. If those arrears, as well as the lands, had been bought by the purchase-money, it would be just to declare him entitled to so much thereof as represented the price of the arrears, and the sub-section, I think, can only be accounted for on this assumption."

And in *Bandon's Estate* (2), FitzGibbon, L.J., referring to this sub-section, says: "Knowing that arrears of rent existed, and seeing that limited owners, if they sold, would have to discharge them, Parliament gave a limited right to treat part of the purchase-money as being the price of income; and, so far as Parliament has sanctioned it, a limited owner, who sells the lands for a certain

(1) [1907] 1 I. R. 116.

(2) [1908] 1 I. R. at p. 131.

sum, may treat the purchase-money as representing the income realized, as distinct from the lands sold."

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Now, although the question I have to decide did not arise in *Crosbie's Estate* (1) or *Bandon's Estate* (2), still all those expressions of opinion as to the object or effect of sub-section 8 seem to me to confirm the view that I have already expressed, that a tenant for life selling the estate is now, by virtue of sub-section 8, entitled from the date of sale to that part of the purchase-money which represents, either in fact or by presumption, the purchase price of arrears belonging to the vendor at the date of sale. In other words, reading the sub-section in the light of the antecedent law and practice, I think it is, in effect, a statutory declaration that the "added arrears" shall no longer become the property of the remainderman, but shall continue to be the property of the person who was entitled to them at the date of sale.

If I am right in this, it seems to me to follow as a matter of course that the interest, which the tenant purchasers are bound to pay under section 35 of the Act of 1896, and which the Land Commission at a subsequent stage are bound to pay under section 24, sub-section 2, upon that portion of the purchase-money representing the purchase price of the arrears, must follow the principal, and, on the death of the person entitled to the principal, be paid to his personal representative.

The curial part of the order was as follows :—

"THE COURT doth declare that the said Caroline Gertrude Marton, as such executrix of Willam Spencer, Viscount Ashbrook, deceased, is entitled to the interest payable under sect. 35, sub-sect. 2, of the Land Law (Ireland) Act, 1896, also to the interest to become payable at a subsequent stage of the proceedings, under sect. 24, sub-sect. 2, of the Irish Land Act, 1903, from the 25th November, 1906 (the date of the death of the said William Spencer, Viscount Ashbrook), on that part of the purchase-money which represents in amount the equivalent of so much of the arrears of rent due to the deceased vendor as are payable under section 24, sub-section 8, of the Irish Land Act, 1903."

J. E. W.

1) [1907] 1 I. R. 116.

(2) [1908] 1 I. R. 131.

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Viscount Ashbrook appealed (1).

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April 19.

Jellett, K.C., and Corran, for the appellant :—

The question, which is now presented for the first time, turns on section 24, sub-sect. 8, of the Irish Land Act, 1903. It only becomes material in the case of settled lands, where a tenant for life dies between the agreements for purchase and the allocation of the purchase-money. Up to his death the tenant for life is no doubt entitled to all the interest in lieu of rent under section 35 of the Act of 1896. It is equally clear that under section 24, sub-sect. 8, of the Act of 1903, his personal representative will on allocation be entitled to arrears not exceeding one year's rent. It is sought to stretch the words of the sub-section so as to give interest on this sum in the meantime to the personal representative. Mr. Justice Wylie bases his judgment on arrears being added to the purchase-money, and that part at least of these arrears belonged to the deceased tenant for life, and, as a segregated fund, was an interest-bearing fund. But this is a misapprehension of what the purchase-money of an estate sold under the Land Purchase Acts really is. Whether the existing arrears are taken into consideration or not, the purchase-money is one whole and indivisible thing: see *In re J. D. Crosbie's Estate* (2), where Fitz-Gibbon, L.J., says (p. 133):—"No holding can be sold without taking the rent account into consideration, and the segregation of the amount at which the rent account figures in the 'purchase-money' of the holding was not contemplated by the statute, and is, in most cases, practically impossible." And Holmes, L.J. (p. 137), says:—"But, in substance and reality, this increase forms part of the price of the holding, and is not something added to the price." And (p. 138):—"Mr. Crosbie has been able, in the case before us, to show precisely what portion of the purchase-money represents arrears; but in the vast majority of sales no such accurate calculation—indeed, no calculation of any kind—has been made. The purchase-money, although intended to include arrears, is arrived at as a bulk sum, and an attempt to

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-GIBBON and HOLMES, L.JJ.

(2) [1907] 1 I. R. at p. 133.

ascertain its component parts would lead to hopeless confusion." In *In re Bandon's Estate* (No. 2) (1) the Lord Chancellor, in referring to sect. 24, sub-sect. 8, says (at p. 128), that this payment out of the purchase-money was given to the tenant for life as compensation for being deprived of the arrears by force of the agreement to sell; and a similar observation is made by Holmes, L.J., at page 133.

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Supposing the sale falls through, the executrix would be entitled to the arrears only, without interest. In the general case of charges upon land, payable at a fixed time, they bear interest only from the time fixed for payment: *In re Drax; Savile v. Drax* (2), *per* Romer, L.J. (pp. 791, 794); *Evelyn v. Evelyn* (3).

Matheson, K.C., and *W. G. Gibson*, for the respondent :—

It is quite immaterial whether the arrears were added to the purchase-money, or were taken into consideration at all, in arriving at it. The effect of sub-section 8 of section 24 is perfectly clear. The personal representative of the deceased tenant for life will be entitled, if the sale goes through, to the arrears not exceeding one year's rent. That carries the right to the proportionate part of the interest in the meantime. The executrix is the only person who, if the sale is from any cause abortive, could sue the occupying tenants for the arrears. Unless she gets the interest, how is that to be credited to the tenants?

THE LORD CHANCELLOR :—

Any doubts the Court may have had have been cleared up by the full argument we have heard. The order of Mr. Justice Wylie is right in terms, and carried out the provisions of sub-sect. 8, section 24, of the Irish Land Act, 1903. Some of the words used in the judgment as delivered are perhaps beyond what was necessary for the decision, though right enough in the sense in which he employed them.

Section 35 of the Act of 1896 provides—" (1) Where an

(1) [1908] 1 I. R. 120. (2) [1903] 1 Ch. 781. (3) 2 P. W. 659, at p. 670.

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agreement for the purchase of a holding is made after the commencement of this Act, and is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rent and arrears existing at such date; but if the advance is refused, the agreement shall be void, and the tenant shall be liable to pay rent and arrears as if the agreement had not been made."

It is useful to see what would happen in this case if this contingency occurred. The section continues—" (2) Interest on the purchase-money, from the date of the said agreement until the day from which the purchase annuity begins, shall be payable half-yearly on the 1st day of May and the 1st day of November, by the purchaser, and shall be paid to and be collected and recoverable by the Land Commission, in like manner as if it were an instalment of the purchase annuity charged upon the holding, and when received by them shall as respects the period subsequent to the date of the advance be applied in payment of the interest due under section 20 of the Land Law (Ireland) Act, 1887, and subject thereto shall be paid to the person in receipt of the rent at the date of the agreement, or such other person as may prove himself entitled thereto, and if the advance is refused shall be allowed by the landlord to the tenant as a payment on account of the rent."

That section, saving the rights of any person to whom the interest would belong, did not, of course, give any such right as is given for the first time by sub-section 8, section 24, of the Act of 1903. But when we see what is done by that sub-section, the whole difficulty is solved. [His Lordship read the sub-section.] The date is the date of the agreement for the purchase of the holding. It is immaterial whether the arrears of rent are added or not. It was proved as a fact that arrears did exist. Once the price is fixed by the purchase agreement, the right of the person to whom the arrears are due would equally arise. What is that? Is it not a charge fixed and declared by law as of the date of the agreement for the purchase, but payment of which is deferred till allocation? What interest is paid? It is a provisional right to

provisional interest given to the man entitled under sub-section 8, and as he is dead the provisional right goes to his executrix—limited, of course, as has been done, by Mr. Justice Wylie's order. That is what the order of Mr. Justice Wylie carries out.

If the sale falls through, the executrix of the deceased tenant for life is the only person who could sue the tenants owing the arrears, and she alone can enter into account with the tenants who would be entitled to credit against the arrears for the interest paid. If, in such a case, the whole of the interest were paid to the present Lord Ashbrook, the account would be taken on a wrong basis. It seems to me immaterial whether this is called part of the purchase-money or not. It is what the executrix will get out of the purchase-money as a charge declared as of the date of the agreement for purchase—a deferred right, which is to become complete on allocation.

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FITZ GIBBON, L. J. :—

The terms of the order of Wylie, J., appear to me to be quite right.

Section 24, sub-section 8, provides that where, at the date of the agreement for purchase, arrears of rent were due, a sum equivalent to those arrears, but not exceeding one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. That sum, if the sale is carried out, will, on allocation, be paid as having been, from the date of the agreement, the money of the owner of the arrears. If so, the person entitled to it should enjoy the fruit it bears in the meantime in the shape of interest. If the sale falls through, the rights of the parties can be adjusted; but I can not see how any one but the owner of the arrears can, in the meantime, be entitled to so much of the money received in lieu of rent as represents the interest on that portion of the purchase-money which is, on allocation, to be paid out to him.

HOLMES, L. J. :—

I am inclined to agree with Mr. Justice Wylie, that this is a curious question and a difficult one. It turns on the construction

Appeal. to be given to sub-section 8 of section 24 of the Act of 1903. If
1909. its effect is to put a charge on the purchase-money, and if that
In re charge is to bear date as of the date of the agreement for purchase,
VISCOUNT is it to bear interest? It is an incumbrance on the purchase-
ASHBROOK'S money, and ought to bear interest. It is now only a provisional
ESTATE. charge. I cannot see how the present tenant for life can ever get
Holmes, J.J. interest on it. Such interest must ultimately go to the executrix
of the original tenant for life.

Solicitor for the appellant : *James Harte.*

Solicitors for the respondent : *Toomey & Barber.*

W. G.

IN THE MATTER OF THE ESTATE OF ELIZA BATTERSBY.

Wylie, J.
1909.

April 20.

Land Purchase Acts—Practice—Appointment of trustees under the Trustee Act, 1893—Jurisdiction of Land Commission—Land Law (Ir.) Act, 1896 (59 & 60 Vict. c. 47), s. 33 (1)—Purchase of Land (Ir.) Act, 1885 (48 & 49 Vict. c. 73), s. 10.

Where certain lands and hereditaments, including a fee-farm rent payable out of an estate sold under the Land Purchase Acts, were subject to a term of years, the trusts of which were to raise a certain sum thereby secured, the Judicial Commissioner appointed trustees of the said term of years for the purpose of receiving the redemption value of the said fee-farm rent, and also the redemption value of any of the property comprised in the said term of years which might thereafter be the subject of proceedings under the Land Purchase Acts.

MOTION by Jane Emily Orr-Owens, that Arthur H. Borrer and Alfred E. Brett be appointed trustees of the term of one hundred and fifty years created by the will of James Owens, deceased, for securing a sum of £5000 with interest thereon, in the place of J. S. Moore and A. Forsythe, deceased, and that the messuages, tenements, lands, and hereditaments subject to the trusts of the said term, may vest in the said A. H. Borrer and A. E. Brett, as such trustees as aforesaid, for the estate and interest formerly vested in the said J. S. Moore and A. Forsythe.

The application was entitled "In the matter of the trusts of a term of one hundred and fifty years created by the will of James Owens, deceased, dated the 30th May, 1843; and in the matter of the Trustee Act, 1893."

By his will, James Owens, who died in 1848, devised to the trustees therein named all the freeholds and chattels real of or to which he should die seized or entitled upon trust to pay certain annuities (which had since determined), and subject thereto to the use of J. S. Moore and A. Forsythe, their executors, administrators, and assigns, for a term of one hundred and fifty years from testator's death, upon trust as soon as occasion should require to

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raise the sum of £5000 with interest thereon as therein mentioned, for the persons therein named in certain shares, and it was thereby provided that the respective shares should vest absolutely on the happening of certain events; and subject to said annuities and said term, testator made other dispositions of his said property, under the limitations of which the said property had become vested in Jane Emily Orr-Owens, who was now entitled thereto for an estate in fee-simple.

Portion of this estate passing under said will and comprised in said term, was represented by an apportioned fee-farm rent of £9 18s. 2½d., payable out of the lands sold in this matter under the Land Purchase Acts, the redemption price of which, after discharging superior claims, was now represented by the sum of £197 13s. 6d. consols, which had been placed to a separate credit.

The trusts of the said term of one hundred and fifty years had not yet been fully performed. The said J. S. Moore and A. Forsythe had long since died, and it had accordingly become necessary that trustees of the said term should be appointed for the purpose of receiving the said sum of £197 13s. 6d. consols.

John Leech, in support of the application :—

The owner of the rent is owner in fee, subject to the term of one hundred and fifty years. There is no settlement within the meaning of the Settled Land Acts. Accordingly, it is necessary that the appointment should be made under the Trustee Act. Section 31 of the Land Law (Ir.) Act, 1896, shows that the intention of the Legislature was, that everything necessary for the completion of sales and distribution of the purchase-money should be done in the Land Commission matter. The following sections establish the jurisdiction of the Land Commission to make the order asked for:—section 33 (1) of the Land Law (Ir.) Act, 1896; section 10 of the Purchase of Land (Ir.) Act, 1885; section 66 of the Landed Estates Court Act; and sections 25, 26, and 35 of the Trustee Act, 1893.

WYLLIE, J.:—

Wyllie, J.
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I will appoint Arthur H. Borrer and Alfred E. Brett trustees of the term of one hundred and fifty years, created by the will of James Owens, for the purpose of receiving the sum of £197 13s. 6d. consols, and any other sums payable to them as trustees of the said term in this or any future sale under the Land Purchase Acts.

In re
BATTERSBY'S
ESTATE.

The curial part of the order was as follows:—

“THE COURT doth appoint the said Arthur H. Borrer and Alfred E. Brett trustees of the said term of one hundred and fifty years, created by the will of James Owens, deceased, dated the 30th May, 1843, for the purpose of receiving the redemption price of the said apportioned rent (or so much thereof as may be available after satisfaction of the redemption value of an apportioned rent of £2 14s. charged thereon), and for the purpose of receiving the redemption value of any of the property comprised in the said term of years which may hereafter be the subject of proceedings under the Land Purchase Acts.”

Solicitor for the applicant: *Bernard M. O'Grady.*

J. E. W.

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PRESTON v. GREENE.

Nov. 13, 14. *Parent and child—Widowed mother dying intestate—Advancement—Hotchpot*
1909. *—Statute of Distributions (7 Wm. 3, c. 6).*
Jan. 19.

A mother, having survived her first husband, made an advancement to a child, and died intestate as to her own assets, leaving other children:—

Held, following *Holt v. Frederick* (2 P. W. 356), that the child advanced was not bound to bring the amount received into hotchpot.

THE question in this case was as to whether a gift of £4795 made by Mrs. Theresa Preston, after the death of her first husband, to her daughter, Miss Marion Reade, on the occasion of her marriage with Mr. French M'Dermott, was such an advancement as must be brought into hotchpot on a claim by the daughter of Mrs. M'Dermott (she having died) as one of the next-of-kin of her grandmother, Mrs. Theresa Preston, to share in the distribution of her assets in respect of which she (Mrs. Preston) died intestate.

Mrs. Theresa Preston had, as a matter of fact, made a will by which she appointed certain funds comprised in a settlement made on the occasion of her marriage with her first husband, Mr. Reade, in favour of her daughter, the defendant, Augusta Greene, and had appointed executors; but she died intestate as regards her own assets, amounting to about £3700, having survived both husbands.

The three next-of-kin of Mrs. Theresa Preston at her death were her daughters, the plaintiff, Rosetta Preston, the defendant, Mrs. Augusta Greene, and her granddaughter, Mrs. Queenie Cairns.

H. Wilson, K.C., and Richard Best, for the plaintiff:—

Mrs. Queenie Cairns is bound to bring into hotchpot the sum of £4795 advanced to her mother on the occasion of her marriage before she can as one of the next-of-kin share in the assets of her grandmother, Mrs. Preston. No doubt, in *Holt v. Frederick* (1),

King, L.C., held that where a child had been advanced by a widowed mother, who died intestate, the child was not bound to bring the sum which he had received into hotchpot. But the grounds of the decision do not appear satisfactory, and the case was decided without much discussion. The object of the Statute of Distributions was to make equal provision for all the children of an intestate, so far as could be estimated: Williams on Executors, p. 1240; *Edwards v. Freeman* (1).

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The decision of *Holt v. Frederick* (2) turned on the construction of the English Statute of Distributions; but the Irish statute, 7 Wm. 3, c. 6 (Ir.), incorporates the provisions of the English Acts 22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3, s. 25; and 1 Jac. 2, c. 17; and there is no important difference. But Lord Chancellor King decided *Holt v. Frederick* (2) on the principle that the English statute was grounded on the custom of London, which has no application here. The case is at variance with modern rules of construction, and should not be followed in this Court if it be wrong. Our contention is that sect. 2 of the Irish Statute of Distributions (7 Wm. 3, c. 6) applies to the distribution of the estates of intestate mothers as well as of intestate fathers, and advancements made by an intestate mother to a child must be brought into hotchpot before the child can share in the intestate mother's assets.

On the question of advancement, see *Batstone v. Saller* (3); *Walker v. Gammage* (4); *Dyer v. Dyer* (5).

The Statute of Distributions clearly should have a more extended construction put on it than that given to it in *Holt v. Frederick* (2), and there does not appear to be any case making its principle the basis of decision. It is referred to in *Bennet v. Bennet* (6), and *Boyd v. Boyd* (7). The words of the statute clearly bear a wider interpretation than that adopted by Lord Chancellor King in his judgment; and his observations may be looked on as merely *obiter dicta*. The Court will construe the section for itself, and if it is clear that the law was wrongly laid

(1) 2 P. W. 435.

(5) 2 Wh. & Tud. 803.

(2) *Ibid.* 356.

(6) 10 Ch. D. 474.

(3) L. R. 10 Ch. App. 431.

(7) L. R. 4 Eq. 305.

(4) 37 Ch. D. 517.

M. R. down, it will not look on the decision as binding. The amending
1908. statute—the Statute of Frauds—applies equally to men and
PRESTON women. The fact that the English Statute of Distributions was
v. interpreted by the profession as applying to the estates of female
GREENE. as well as male intestates is shown by the fact that it was thought
necessary to enact the amending section of the Statute of Frauds
(s. 25). If the Statute of Distributions did not apply to female
intestates, there would have been no necessity for the amending
section.

The word “his” clearly means “man” and “woman.” It would be waste of time to cite cases to show that this is the construction to be adopted. By 52 & 53 Vict. c. 63, it is enacted that words of masculine gender shall include females. In this case the greatest injustice will result to the plaintiff if the sum advanced to Miss Marion Reade on her marriage is not brought into hotchpot. In fact, it works out the particular injustice which the statute was passed to prevent—the object of the Statute of Distributions being “to make the children’s provision equal,” and the Act takes into consideration that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child so advanced but in part, shall have so much more out of the intestate’s personal estate as will suffice to make his share equal to that of the other children. See the observations of Raymond, C.J., in *Edwards v. Freeman* (1). “The intention of the Act,” he further says, “is grounded upon the most just rule of equity, *equality*.”

Statutes are not always drawn with accurate precision, and the real question is, What is intended by the Act? If this matter were *res integra* (and so we ask the Court to deal with it), the thing is very plain. And now, under the Married Woman’s Property Act, 1882, a married woman having separate property is subject to liability for the maintenance of her children. There is now the same obligation practically on a woman as a man to provide for children.

Oulton, K.C., for the defendant, *Mrs. Augusta Greene*, reserved any observations he might make to the Court in the event of the Court holding that the case was not ruled by *Holt v. Frederick* (1), his client having been appointed on her marriage with Mr. Greene the entire funds comprised in a settlement executed on the marriage of her father, Mr. Roade, with the deceased, Mrs. Theresa Preston.

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T. Henry Maxwell, for Mrs. Cairns:—

The provisions of the Statute of Distributions, 7 Wm. 3, c. 6 (Ir.), whereby children advanced by an intestate are obliged to bring such advance into hotchpot when claiming a distributive share of the deceased's assets, do not apply to the estates of intestate mothers, but only to the estates of intestate fathers. This has been directly decided by Lord Chancellor King in 1726: *Holt v. Frederick* (1); which has been treated as the law ever since. The case has been referred to in subsequent cases, and the correctness of the decision has not been questioned: see *Edwards v. Freeman* (2); *Boyd v. Boyd* (3); *Bennet v. Bennet* (4), where Sir G. Jessel, M.R., says:—"From *Holt v. Frederick* (1) downwards it has been held no such obligation [*i.e.*, equitable obligation to advance a child] exists on the part of a mother." The case has been cited as law in text-books of great authority: see Williams, Executors (10th ed.), p. 1241; Snell, Equity (15th ed.), p. 88. The provisions of the English Statutes of Distributions, 22 & 23 Car. 2, c. 10, and 29 Car. 2, c. 3, on which *Holt v. Frederick* (1) was decided, are embodied in the Irish statute, the language of which in relation to advancement is identical with the English statutes. *Contemporanea expositio est optima et fortissima in lege*, and the rule must be specially remembered in relation to the large changes which have occurred in recent opinion and legislation as to the rights and liabilities of women. I submit that *Holt v. Frederick* (1) is an authority expressly in point, and binding on this Court. The rule that masculine should in Acts of Parliament include feminine, enacted

(1) 2 P. W. 357.

(2) *Ibid.* 435.

(3) L. R. 4 Eq. at p. 308.

(4) 10 Ch. D. 474.

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by the Interpretation Act, 1889, 52 & 53 Vict. c. 63, sect. 1, is expressly limited to statutes passed after the year 1850, and applies only "unless the contrary intention appears," which again brings one back to *Holt v. Frederick* (1). Even if the decision were incorrect, it should now be followed: *Bain v. Fothergill* (3); *Julius v. Bishop of Oxford* (4).

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THE MASTER OF THE ROLLS:—

[After stating the facts, continued:—]

Mr. Maxwell contended that *Holt v. Frederick* (1) having been decided by Lord Chancellor King so far back as Trinity Term, 1726, and never having been, so far as he could discover, judicially commented on or discussed in an adverse sense, was binding on me, whatever my own view of the subject might be.

It was a decision on the English Statute of Distributions (22 & 23 Car. 2, c. 10)—a statute which was explained by the Statute of Frauds (29 Car. 2, c. 3); and sections 3 and 5 of the first-mentioned statute, and the subsequent section (section 25) in the Statute of Frauds, are embodied in our own Irish statute, and I have compared the statutes carefully, and, for practical purposes, there is no difference between them.

If I were free to discuss the judgment of Lord Chancellor King and the two grounds on which he rests his decision in *Holt v. Frederick* (1), I might say that the very fact that the statute takes care to preserve the customs of London and the province of York was an argument in favour of a wider construction of the rest of the statute, and that in point of fact the very exception showed that the statute had a larger scope and wider field than the customs of London or the province of York. I might also say with regard to the second ground on which the decision was based, namely, that the statute only includes in the clause of hotchpot those "who are capable of having a wife as well as children," that if that argument were pressed to its legitimate conclusion the effect might be very disastrous. I agree with the argument of counsel that it would be mere

(1) 2 P. W. 356. (2) L. R. 7 H. L. at p. 174. (2) 5 App. Cas. at p. 239.

pedantry to cite cases in which the word "his" has been used as including male and female. *Homo* embraces both sexes. Mankind includes womankind; and there is one very appropriate illustration in the Old Testament which appears to me to answer to a certain extent the argument of Dr. Sayers and the judgment of Lord Chancellor King in *Holt v. Frederick* (1), and that is to be found in the 20th Chapter of Exodus and in the 10th Commandment, where the word "his" can scarcely be read as referring only to the male; though, by parity of reasoning, "wife" being mentioned there, the commandment would only apply to a person capable of having a wife. Mr. Maxwell cited passages from textbooks of high authority, in which the decision in *Holt v. Frederick* (1) is quoted as a binding authority; and, at the close of the argument, I was under the impression that no writer of repute had thrown doubt upon the case. The decision has, however, been adversely commented upon by one eminent lawyer, for I find in Jarman's Conveyancing (3rd edition), vol. xi., page 412, the following passage:—"The hotchpot clause in the statute of 22 & 23 Car. 2, c. 10, has given rise to many questions. It has been held not to apply to the case of an advancement by a widow, its language being exclusively applicable to the male parent: *Holt v. Frederick* (1); though, seeing how intimately this clause is connected with the general enactment, there seems to be much difficulty in supporting such a construction, except upon grounds that would exclude the case of a widow dying intestate from the statute altogether, which clearly would not be listened to."

But it is right to say that in the last edition of this great work this passage does not appear. I suppose the learned author got tired of making a protest of which no notice was taken.

It is said, further, that in two cases *Holt v. Frederick* (1) has been mentioned without dissent. That is so. But in my opinion it is not mentioned in either case in any way that helps Mr. Maxwell's argument. [His Lordship referred to *Bennet v. Bennet* (2) and *Boyd v. Boyd* (3).]

My summary of the law is this, that a mother may advance a child, a widowed mother may advance a child, and the difference

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(1) 2 P. W. 356.

(2) 10 Ch. D. 474.

(3) L. R. 4 Eq. 305.

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between a father and a mother is this, that in the one case there is a moral obligation to do so recognized in equity, while in the case of a mother the moral obligation is there, but the Courts of equity do not recognize it.

Am I then at liberty, no matter how strongly I feel, to set up my own view against a decision pronounced nearly two centuries ago?

Mr. Maxwell says that the best exposition of a statute or of any other document is that which it receives from contemporaneous authorities, and that it is almost impossible to get rid of an interpretation which has been acted on for 200 years.

In *Ex parte Willey* (1) Jessel, M.R., says:—"Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have then made a law which men follow in their daily dealings, it has been held even by the House of Lords that it is better to adhere to the course of the decisions than to reverse them because of the mischief which would result from such a proceeding."

That sums up the view I took in *M'Naul's Estate* (2), in which the Court of Appeal overruled *Billing v. Welch* (3), a decision of the Queen's Bench on the construction of the Renewable Leasehold Conversion Act. The titles of many owners of property depended on that judgment. The case came before me, and Mr. Ronan argued that I was bound to construe the statute for myself. I refused to do so, because of the antiquity of the decision and the practice of conveyancers adopted on the basis of that decision.

I think I am bound to do the same here. If there is the same result as in *M'Naul's Case* (2), in the Court of Appeal or in the House of Lords, I consider it is reasonably plain from what I have said that I will shed no judicial tears.

Solicitor for plaintiff: *E. E. Merrick.*

Solicitors for the defendant: *Hayes & Son.*

Solicitor for Mrs. Cairns: *Leachman.*

R. W. L.

IN RE DUBLIN NORTH CITY MILLING COMPANY.

M. R.
1909.

*Company—Directors—Articles of Association—Transfer of shares—Power to
refuse transfer.*

Feb. 3.

Where the registration of a transfer of shares in a Company is (under the articles of association) subject to the approval of the transferee by the directors, the fact that the proposed transferee is already a shareholder does not entitle him to have the transfer registered as matter of course; but it is discretionary with the directors to register the transfer to him or not, and, in the absence of evidence that the directors have acted *mala fide*, their refusal to register cannot be questioned.

ADJOURNED SUMMONS.

The Dublin North City Milling Company, Ltd., was a company registered under the Companies Act, 1862.

The 26th article of association provided as follows:—"The directors, on behalf of the Company, may decline to register any transfer of shares not in the prescribed form, or whilst the member making the same is either alone or jointly with any other person indebted to the Company on any account whatever, or unless the transferee is approved of by the board."

In June, 1908, Mr. Edward Spicer became the registered holder of twenty-five fully paid up shares of £5 each of the Company.

On the 21st August, 1908, he purchased thirty additional fully paid up shares from Mr. Edward O'Connor, and obtained certificate and transfer of these shares duly executed.

Mr. Spicer sent the transfer to the secretary of the Company for registration. The secretary wrote to Mr. Spicer stating that the directors refused to register the transfer, and returned the certificate and transfer. Mr. Spicer was not indebted to the Company. He was managing director of the firm of John Spicer & Co. (Limited), millers and bakers.

In an affidavit by one of the directors of the Company it was stated that, although there did not appear to be any objection to the first transfer of shares, yet when an application for a

M. R. second transfer was made, the directors considered the matter
1909. carefully, and came to the conclusion that it would not be in the
In re interest, but to the detriment and injury, of the Company, and of
NORTH CITY its property and business, if the proposed transfer were registered ;
MILLING Co. and accordingly they refused to register.

An application was now made to the Court on behalf of Edward O'Connor and Edward Spicer for an order that the register of members of the Dublin North City Milling Company (Ltd.) might be rectified by inserting therein the name of John Spicer as the holder of thirty shares of the Company instead of Edward O'Connor.

Serjeant O'Connor, K.C., and M'Gonigal, for the applicants :—

The refusal of the directors to register the transfer is not *bona fide*. They put Mr. Spicer on the register of shareholders two months before the transfer now in question was sent to them. The first registration gave Mr. Spicer all the rights of a shareholder. The only effect of the present transfer is to give one more vote to Mr. Spicer. It is no answer to an application for registration that the transfer will increase the voting power of the applicant: *Moffatt v. Farquhar* (1).

There is no suggestion that Mr. Spicer is not a man of position and means. In any event the shares are fully paid up. What could have happened in the short time between the first registration of Mr. Spicer as a shareholder and the transfer now in question? The principle of *Moffatt v. Farquhar* (1) applies, and we submit that the directors are now precluded from objecting to the registration of the transfer to Mr Spicer.

Ignatius O'Brien, K.C., and P. A. O'C. White, for the Company :—

Under the articles of association the directors have power to refuse to register the transfer, and are not bound to state their reasons. *Moffatt v. Farquhar* (1) was decided on the particular words of the articles of settlement of the Company. In the absence of evidence to the contrary, the Court will assume that the directors have acted reasonably and *bona fide*: *Ex parte Penney* (2). In that

(1) 7 Ch. D. 591.

(2) L. R. 8 Ch. App. 446.

case James, L.J., says—"The clause in the deed of settlement appears to me clear which provides that no transfer shall be made to any person outside the Company, unless that person shall be approved of by the board of directors"; and in this case the directors are given, under the articles, absolute power of approval or disapproval. The fact that Mr. Spicer was already registered as a shareholder can make no difference. Every new proposal for transfer of shares has to be considered by the directors. The fact that a man is considered fit to be a shareholder on Monday does not prevent his being considered unfit on Saturday. Fitness once ascertained does not import fitness for ever. A man's fitness must be tested as of the date he presents the transfer. The directors cannot be compelled to disclose their reasons for refusing to register the transfer. Here there is no reference to the fitness or unfitness of Mr. Spicer. There is no limit in the articles to their power of refusal. In the absence of evidence that the directors have not acted *bona fide*, their refusal to register cannot be questioned: *In re Coalport China Co.* (1). [Counsel also cited *In re Hannen's King Gold Mining Co.* (2) and *Shepherd's Case* (3).]

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THE MASTER OF THE ROLLS:—

The question practically narrows itself to this point, does the fact that Serjeant O'Connor's client, Spicer, is already a member of the shareholders of the Dublin North City Milling Company, entitle him to call on the directors to give their reasons for refusing to transfer additional shares into his name, or does it not so entitle him?

The general rule applicable to cases of refusal to register is clear. Different cases come before the Courts from time to time, and particular circumstances render the decisions, apparently, not altogether harmonious; but I think that the case of *In re Coalport China Company* (1) sums up in as clear a way as possible the true guiding principle on which the Court should act. In that case it was held by the Court of Appeal in England that, in the absence of any evidence that the directors had not acted *bona fide*, their refusal to register a transfer of shares could

(1) [1895] 2 Ch. 404. (2) 14 T. L. R. 314. (3) L. R. 2 Eq. 364.

M. R. not be questioned. The obligation sought to be imposed on the
 1909. directors of the Company in that case is dealt with by Lindley,

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L. J.

At page 407 he says:—"This appeal must be allowed. The question raised is an extremely simple one; and before I read the articles I will state shortly the principle which I think is applicable to it. Under the articles the directors have a power to refuse a transfer. I will not say at present for what reasons: I will allude to them presently. They do refuse a transfer; they do not say why. The argument is, and the view taken by the learned Judge is, that it is for them to justify their conduct. Now, that appears to me to be wrong. It is for those who say that the directors have exercised their power improperly to give some evidence to that effect. Here there is absolutely none. Therefore, in common fairness, as a matter of justice between man and man, it strikes me that the decision is based upon an erroneous principle. That was precisely the ground on which the Court of Appeal in *Ex parte Penney* (1) differed from the then Master of the Rolls. I am aware that the articles were not quite the same in this case as in that; but the Master of the Rolls there held that the directors were bound not only to act *bona fide* (which of course they are), but that the directors were bound to preserve some kind of evidence that they acted *bona fide* so that the Court might see that they had so acted. The Court of Appeal said: 'No, that is not part of their business; show us that they have not acted properly, give us some evidence of that kind, and we have ample power to interfere.'"

He further says (p. 409): "I wish to be cautious in this matter, because I have not the slightest doubt that the Court has ample power to control the refusal of directors, or the exercise by them of their power to refuse, provided there is some evidence which justifies the Court in coming to the conclusion that they have not done their duty; but in the absence of all such evidence, the Court has no right to presume—it is contrary to the ordinary principles of justice to do so—that they have done wrong, but it must be presumed that they have done right. I consequently

(1) L. R. 8 Ch. App. 446.

think that the appeal should be allowed with costs here and below."

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Whether that case be or be not distinguishable from, or inconsistent with, *Moffatt v. Farquhar* (1), it is hardly necessary to say. The one is a decision of the Court of Appeal in England; the other is a decision of a Court of first instance—a Judge of the Chancery Division. However, in *Moffatt v Farquhar* (1), Malins, V.-C., says: "The question therefore raised and the only question I have to decide is, what is the power of the directors in vetoing or forbidding the transfer of the shares? Now that entirely depends upon the 82nd clause of the deed of settlement of the Company," so that when he says that the directors had no right of objection to a transfer of shares, except in reference to the personal qualification of the proposed transferee, he is referring to the provisions of the 82nd clause of the deed of settlement of a particular Company; and, therefore, in construing articles of association the first general proposition is, that you must ascertain the power of the directors from the very words of the articles.

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The decision of Malins, V.-C., has in this case no application. Here there is no restriction, and no limit on the powers of the directors.

Mr. Spicer says, "You must accept me as transferee of the shares."

The directors reply—"Read the articles of association." Article 26 provides: [His Lordship read the article.]

I call attention to the wording of the article. It is not similar to the wording of the clauses in either of the two cases to which I have referred. It does not contain the words "no person not being already a shareholder," which occur in the clause in *Penney's Case* (2). [His Lordship referred to *Penney's Case* (2).] Each transferee who demands registration of a transfer must allege and prove some indirect motive on the part of directors in refusing his application. The fact that he is already a shareholder does not prove this. The onus lies on the applicant. Serjeant O'Connor and Mr. McGonigal suggest that the narrow margin of time between the two events, the change of front unexplained and

(1) 7 Ch. D. 591.

(2) L. R. 8 Ch. App. 446.

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unaccounted for, must mean that the directors were not acting *bona fide* in the interests of the Company in refusing to register the transfer of the second lot of shares, but were acting for some obscure reason which they decline to disclose.

I dislike mystery, but I think the law is wise in refusing to compel directors to disclose their reasons for accepting or declining a transfer. The directors have kept themselves within the rule, and the reasons operating on their minds are not disclosed, and I cannot speculate or guess as to what they were. There could not have been anything dishonourable, or anything approaching personal unfitness on the part of Spicer. But I am of opinion that the law allows the directors to hold their tongues. It allows them to say that everything was done honestly and *bona fide* in the interests of their Company; and they have unanimously decided that it is not for the interest or advantage of the Company that these shares should be transferred to Mr. Spicer: and according to my view I have no power to make them say more.

If Mr. Spicer had made a clear, definite charge against the directors of corruption, or conspiracy, or dishonesty, I should have had them examined before me; and if I came to the conclusion that they had not acted fairly and honestly, I should compel them to register the transfer.

There is no proof that these directors did not act in the way they were entitled to act under the articles.

My considered judgment is that under these articles the duties of the directors as regards approval or disapproval arise on every fresh transfer of shares, and that, under these articles, the mere fact that the proposed transferee is already a shareholder does not and cannot diminish their powers, or lessen their obligations, "on behalf of the Company," in respect of "*any transfer of shares.*"

Solicitor for the applicant: *Richard Davoren.*

Solicitors for the Company: *J. L. Scallan & Co.*

R. W. L.

ALEX. DICKSON & SONS, LIMITED, v. ALEXANDER
DICKSON & SONS, ALEXANDER DICKSON, JOSEPH
DICKSON, AND ALEXANDER DICKSON, JUNIOR (1).

Appeal.
1909,
Feb. 11, 12,
18, 24.

(1907. No. 497.)

*Trade name—Untrue description—Trader's own name with misleading addition
—Injunction—Costs—Unnecessary witnesses subpoenaed but not examined.*

The plaintiffs, a firm of horticulturists, had traded for over fifty years under the name of *Alexander D. & Sons* in the North of Ireland. In 1900 they were incorporated as a joint stock company, as *Alex. D. & Sons, Limited*, and in the following year opened a shop in Dublin. They acquired a considerable reputation as growers and propagators of roses, and garden seeds, thereby rendering (as was admitted) their trade name of high commercial value. The defendant, whose name was *Alexander D.*, was established in Dublin from 1875 as a trader in the heavy seed (non-horticultural) business, and, about 1897, opened a shop in Capel Street as "The Ashbourne Agricultural Company." Two years later he put the name "Alexander D., proprietor," on the sign-board. He subsequently moved the business to a house in Parliament Street, where it was carried on as the "Ashbourne Agricultural Company," without any addition of the proprietor's name. This continued until February, 1907. In 1905 the defendant purchased ground near Dublin, which he turned into a nursery for roses and other plants, advertising it as "The Home of the Rose." He had two sons, one employed as an assistant at the house in Parliament Street, the second at the nursery—neither being in partnership with him. The plaintiffs having gone into the agricultural seed business, and obtaining a Government contract for it when the defendant made an unsuccessful tender, he, admittedly by way of reprisal, advertised as a rose-grower and horticulturist at the nursery address as "*Alexander D. & Sons*," as well as for potatoes and heavy seed business, under that title and at that address, while he continued in the same papers advertisements as the "Ashbourne Agricultural Company" at Parliament Street. He also answered a "trap" letter ordering roses of other growers' introduction, by offering to comply with the order at a subsequent date; and, as the result of a large body of evidence, oral and documentary, the Court being of opinion that the defendant had designedly attempted, by the addition of the words "& Sons," to use a trade designation untrue in fact, as the sons were not partners, to lead

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the public to believe that his business, and the roses and other plants sold by him, were those of the plaintiff Company, affirmed the judgment of the Master of the Rolls, granting an injunction restraining the defendant from carrying on business as *Alexander D. & Sons*; but varying the order of the Master of the Rolls appealed from, so as to permit the defendant to carry on business under his own name as *Alexander D.*

Turton v. Turton (42 Ch. D. 128) distinguished.

The Court being of opinion that, notwithstanding the pleadings, the extensive and valuable trade reputation which the plaintiff Company enjoyed was not really in controversy; and, having regard to its admission by defendants' counsel at the opening of the trial, dismissed a cross-appeal by the plaintiff Company from portion of the judgment of the Master of the Rolls disallowing the costs of witnesses on this question who were subpoenaed but not examined.

APPEAL by the defendant Alexander Dickson, from the judgment of the Master of the Rolls, dated the 9th May, 1908, the curial part of which was as follows:—

“ This Court doth order that the defendant Alexander Dickson be, and he is hereby, restrained from carrying on the business of nurseryman, either in the name of ‘Alexander Dickson & Sons,’ or ‘Alex. Dickson & Sons,’ [or under any style in which the name of ‘Dickson’ appears without taking reasonable precautions clearly to distinguish the business carried on by the defendant, Alexander Dickson, from the business carried on by the plaintiffs] (1), and from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that the business of the defendant Alexander Dickson is the business of the plaintiffs, or that the goods sold by the defendant Alexander Dickson are the goods of the plaintiffs; and this Court doth order that the said defendant do pay to the said plaintiffs their costs of this action when taxed and ascertained, save so much thereof as has been occasioned by the plaintiffs seeking to have the defendant restrained from selling any roses or seeds not grown or propagated by the plaintiffs as ‘Dickson’s roses,’ or ‘Dickson’s seeds,’ or as ‘Dickson’s Irish roses,’ or ‘Dickson’s Irish seeds’; and in the taxation of the said costs, it is ordered that the costs and expenses of the witness Alexander B. Scott, and of all

(1) The words in brackets were omitted in the judgment of the Court of Appeal.

witnesses subpoenaed by the plaintiffs to prove their reputation but not examined, be disallowed against the said defendant."

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The action was brought by the plaintiffs, a Company incorporated under the name Alex. Dickson & Sons, Limited, against Alexander Dickson & Sons, Alexander Dickson, Joseph Dickson, and Alexander Dickson, junior, as defendants, seeking for an injunction to restrain the defendants from trading in such a way as to lead the public to believe that their business, or the roses and seeds sold by them, was the business of, or were roses or seeds grown or propagated by, the plaintiffs; and from referring by advertisement, or otherwise, to a nursery called Woodlawn at Dundrum, county Dublin, the property of the defendant, Alexander Dickson, as "The Home of the Rose." It having been admitted in answer to notice that there was no partnership in the firm of Alexander Dickson & Sons, the action was discontinued against Joseph Dickson and Alexander Dickson, junior.

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The business of the plaintiff Company was founded in 1836, by a nurseryman and seedsman named Alexander Dickson (now deceased). It was first established at Newtownards, and was subsequently extended to Belfast, Dublin, and Blackrock, county Dublin, and Ledbury, Herefordshire.

This business was carried on continuously under the title of Alexander Dickson & Sons, from 1836 to 1900, when it was formed into a limited liability Company, registered as Alex. Dickson & Sons, Limited. It may be taken as admitted, although formally traversed in the statement of defence, that during these years the plaintiff Company and their predecessors had acquired a wide reputation in the home, colonial, and foreign markets as growers and propagators of roses, and their roses and seeds, known as "Dickson's roses," and "Dickson's seeds," and "Dickson's Irish roses," and "Dickson's Irish seeds," had been largely advertised under these names, had very large sales, and enjoyed an extensive reputation for excellence. The Dublin business of the plaintiff Company was opened in Dawson Street, in 1901; and in 1906 they acquired a nursery at Blackrock. Down to 1907, the principal, if not the exclusive, business of the plaintiff Company was as florists, and especially as rose-growers; but in the year 1907 they entered into the heavy seed business, such as the sale

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of seed potatoes, and so advertised; and in the spring of that year, they obtained contracts from the Department of Agriculture, for which the defendant Alexander Dickson had unsuccessfully tendered.

The defendant, Alexander Dickson, whose full baptismal name was Alexander Buchanan Gordon Dickson, but who never used any name but Alexander Dickson, had been in business for forty years. He came to Dublin in 1875. He bought a shop in Capel Street, about twelve years prior to the action, where he carried on business as a grain and seed merchant, under the name of the "Ashbourne Agricultural Company," with the words, "Alexander Dickson, Proprietor," on the signboard. He moved to Parliament Street, still trading as the "Ashbourne Agricultural Company." There was no signboard with the proprietor's name at the Parliament Street premises. His sons, Joseph, over 26 years of age, and Alexander junior, about 19, assisted him in the business, but were not partners. Joseph had been assisting in Parliament Street for eleven years. He had asked to be made a partner, but his claim to be admitted to partnership was refused for the present. On the 20th September, 1905, the defendant acquired premises at Woodlawn, Dundrum, county Dublin, which he converted into a nursery. Alexander Dickson, junior, was employed there. The defendant then went into the horticultural business, and advertised plants in the *Irish Times*, as Alexander Dickson & Sons, Woodlawn Nurseries, also advertised in *Garden Life*, "Irish Roses" under the same title, and "Irish Seed Potatoes" as "Alexander Dickson & Sons, Woodlawn Nurseries, Dundrum," and in the same issue "Irish Seed Potatoes," as "Ashbourne Agricultural Company, Parliament Street, Dublin," as stated in the judgment of the Lord Chancellor, *infra*, p. 197.

The substance and effect of the very voluminous evidence given at the trial are also fully stated in the judgments of the Lord Chancellor and Holmes, L.J.

Soon after the defendant had assumed the trade name of Alexander Dickson & Sons some inconvenience was experienced in the misdelivery of letters. On the 25th February, 1907, one of the directors of the plaintiff Company wrote to the defendant (addressing him as Messrs. Alexander Dickson & Sons, Wood-

lawn Nurseries, Dundrum, county Dublin), referring to advertisements in the *Irish Times*—pointing out “in a friendly spirit” how the use of this new title was “likely to lead to much confusion and annoyance to our respective firms.” The letter suggested “The Ashbourne Seed and Nursery Co.” as a suitable trade name.

The defendant replied by letter, dated 26th February: “The position that you refer to arises to a large extent from your own conduct. Your house has been looked upon as a deservedly high-class nursery and garden seed business, but when you enter into the common, heavy seed and grain trade, and cut out those who have hitherto carried on that branch, we are ourselves forced to find other avenues of business.”

In answer to this the plaintiff Company wrote on the 2nd March, as follows:—“We are in receipt of your letter of the 26th ult., and at once express our disappointment and astonishment at its tone and contents. When we wrote our letter of the 25th ult., we did not then desire to put a harsh construction upon your action in the matter of the use of the name Alexander Dickson & Sons, but the advertisement which appeared on the day following that upon which our letter was written, and your letter of the 26th ult., very clearly indicate the intention and motives which prompted you to change your firm’s name from the Ashbourne Agricultural Co. to that of Alexander Dickson & Sons. Your letter openly states that your action in the adoption of this name was a retaliatory step because we had extended our business in a direction which you seem to think will prejudicially affect the business carried on by you. We cannot, and do not, complain of any effort made by you to extend your business honestly and legitimately. We can, and do, however, most seriously complain of your attempt, which we must now characterize as nothing more or less than commercial piracy. Your last advertisement could have no other meaning than that you deliberately wished to represent that the goods which you offer were grown and produced by us, and you are perfectly well aware that the name of our firm is indissolubly connected with the introduction and growing of roses, and that the public must of necessity be deceived by the advertisements published by

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you in the *Irish Times*. Your letter admits that confusion must arise and tries to shoulder the responsibility of it on us, but ineffectually. We, however, put it further than confusion now, as we state that your advertisement is a deliberate attempt to capture our trade, and to use for your own advantages the reputation of our firm as rosarians amongst the general public, not only in the three Kingdoms but over the whole world."

Some further letters passed without result, the defendant insisting on his right to use his own name and to associate his sons in the title of the business. Up to this time it appears to have been assumed that defendant and his sons were in partnership. Finally on the 24th April, 1907, the solicitors for the plaintiff Company wrote calling on defendant (addressed as Alexander Dickson & Sons, Woodlawn Nurseries) for an undertaking to "discontinue the use of the name 'Alexander Dickson & Sons' in the manner complained of by them, and continue using the trade name already adopted by you, or some suitable modification of it." In the alternative the present action for an injunction was threatened.

The defendant in reply referred them to his own solicitors, and the action was commenced.

On the 15th April, 1907, a letter was received at defendant's nurseries signed T. Coulthwaite, and purporting to be addressed from "Hednesford, Staffs," to Messrs. Alexander Dickson & Sons, Woodlawn Nurseries, Dundrum, county Dublin. It was as follows:—"DEAR SIRs,—Referring to your advertisement in *Garden Life*, March 15th, please forward me one dozen dwarf roses. I enclose postal order for 8s. I wish the dozen to include one each of the following roses of your own introduction, viz.:—Margaret Dickson, Bessie Brown, Mrs. R. G. Sharman-Crawford, Killarney (1). If these varieties are more expensive, I will forward difference on receipt of invoice."

Defendant replied:—"We beg to state that as the season is now so far advanced we would not care to send forward the roses

(1) Grown by Dickson, of Belfast, and Dickson, of Ards, respectively, and not by plaintiff Company. Mr. Alexander Dickson, son of the chairman of the Company, stated in his evidence that any rose-grower might raise and sell these varieties.

without writing to you first on the matter. The plants have now made a fair amount of growth, and removal at this season might be fatal to their growth. Please say shall we return you the cash sent, or keep your order till next October." This was signed "Alexander Dickson & Sons."

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Coulthwaite's answer, dated 21st April, was, "You might please book my order for October next, and have them forwarded as soon as they are ready to lift. Please say if the amount I sent will cover the varieties of your own introduction which I named. In the meantime you can send me on carnations and pyrethums to the value of 8s. I leave the selection to yourselves."

Defendant on the 22nd April forwarded the carnations and pyrethums with invoice and receipt, but did not make any further reply.

One of the witnesses examined for the plaintiffs was H. D. Smith, who had been the defendant's manager for ten years. In reference to Coulthwaite's order, he had a conversation at the time with the defendant as to whether it was a trap, especially because of the words "of your own introduction." They determined not to execute the order, putting their refusal on the lateness of the season; the money was kept. It did not appear that Coulthwaite was connected with or instigated by the plaintiff Company.

Serjeant O'Connor, K.C., and Richard Best (with them The Right Hon. James H. Campbell, K.C.), for the appellant:—

There is no evidence of any injury to the business of the plaintiff Company, or that they sustained any loss of customers.

In cases of this kind, where a trader uses his own name, although a similar business may have been carried on under that name by another trader, the latter is not entitled to restrain him by injunction: *Turton v. Turton* (1), where the plaintiffs had for many years carried on business in Sheffield as steel manufacturers, as Thomas Turton & Sons. The defendant, whose name was John Turton, carried on similar business also in Sheffield, as John Turton & Co., and afterwards, having taken his sons into partnership, carried on the same business as John Turton & Sons.

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North, J., granted an injunction, holding that the defendant had adopted a descriptive name calculated to deceive, but his decision was reversed on appeal. Lord Esher says (p. 136):—"Therefore, the proposition goes to this length; that if one man is in business, and has so carried on business that his name has become a value in the market, another man must not use his own name. If that other man comes in and carries on business, he must discard his own name and take a false one. The proposition seems to me so monstrous that the statement of it carries its own refutation." He then refers to Lord Justice Turner's judgment in *Burgess v. Burgess* (1), where he says (p. 904):—"No man can have any right to represent his goods as the goods of another person. . . . Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he so uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff." Lord Esher held that this amounted to a decision that these two facts alone would not make a *prima facie* case. No doubt, if he did other things to represent his goods as those of the plaintiff, he would be prohibited, but not otherwise. Lord Esher adds that, in his opinion, that was a perfectly correct representation of the law on the subject. *Croft v. Day* (2) turned on imitation of the way in which the goods were made up. In *Cash v. Cash* (3) the materials manufactured by the Company were identified with the plaintiffs. They could not be put on the market without the Company's name. The name of the plaintiffs was so indissolubly connected with the articles that they could not be sold as Cash's goods, without the probability of their being taken as those of the plaintiffs. The defendant, who was also named Cash, set up a business in the same town for the manufacture of similar goods. There was no evidence of the defendant having represented his goods as being those of the plaintiffs, or having imitated the make-up of the plaintiffs' goods. Kekewich, J., granted an injunc-

(1) 3 D. M. & G. 896, at p. 904.

(2) 7 Beav. 84.

(3) W. N., 1901, p. 46; W. N., 1902, p. 32.

tion in the terms of the order made by the Master of the Rolls in the present case, but the Court of Appeal held that it was too wide, and it was by consent varied, so as merely to restrain the defendant from carrying on the business without taking precautions to distinguish his own business from that of the plaintiffs. Vaughan Williams, L.J., said there never was a case where a man was restrained from carrying on business in his own name. As to the trade name of a firm, and the right to use the addition of words such as "& Co.," or "& Sons": see *Tussaud v. Tussaud* (1); *Levy v. Walker* (2), and *Valentine v. Valentine* (3).

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Ronan, K.C., S. L. Brown, K.C., and James Andrews, for the respondents:—

In 1907 the defendant dropped the fancy name "Ashbourne Agricultural Company," under which he had been trading for eight years, and adopted a new fancy name, "Alexander Dickson & Sons"—for what purpose? Then correspondence shows that as the plaintiff Company had gone into the heavy seed and grain trade, the defendant was forced to find other avenues of business—in other words, to get the plaintiff Company's horticultural trade, and their business as rose-growers, by a colourable imitation of their well-known and old-established trade name. In *Burgess v. Burgess* (4) the Court recognized that even the use by a trader of his own actual name might be restrained, if the facts showed that its adoption was for the purpose of misleading and deceiving the public as to the goods he was offering for sale under that name: *Sebastian*, Law of Trade Marks, pp. 260, 261.

In *Turton v. Turton* (5) there was no suggestion of fraud, and there was a real partnership; here the sons were not partners. The addition "& Sons" was a deliberate misrepresentation, and its only object was the fraudulent one of passing the defendant's establishment off as one of the plaintiffs' branches, and thereby inducing the public to give him orders: *Warner v. Warner* (6). Here the sale to Coulthwaite is the very kind of evidence that was held in *Warner v. Warner* (6) sufficient to show that the trader was

(1) 44 Ch. D. 678.

(2) 10 Ch. D. 436.

(3) 31 L. R. Ir. 488.

(4) 3 D. M. & G. 896.

(5) 42 Ch. D. 128.

(6) 5 Times L. R. 327, 359.

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acting so as to mislead the public, and that he was advertising his goods in such a way as to acquire a portion of the reputation previously enjoyed by the plaintiffs. In that case Lopes, L.J., said (p. 360) that he had seldom seen a case in which a fraudulent intent was more clearly made out. That it is quite legitimate to set a trap where fraud is suspected : see *Dunlop Pneumatic Tyre Company v. Neal* (1). The defendant did not give any notice to his customers of the change of name. He took no precautions against its misleading effect. As to the costs (2) of the witnesses who were subpoenaed to prove the extent of the plaintiffs' trade reputation, it was an essential part of their case ; it was expressly averred in the statement of claim, and traversed by the defence. The plaintiffs could not have safely gone to trial without independent and reliable evidence of the value of their trade name. No counsel would advise that the uncorroborated evidence of the chairman and secretary of the plaintiff Company would be sufficient. The admission was not made until after the case commenced.

Feb. 24.

THE LORD CHANCELLOR :—

I think it will be convenient to state the position of the respective parties in February, 1907, when the first use of the plaintiffs' trade name complained of in the action took place.

The plaintiffs for over a half a century traded under the name of Alexander Dickson & Sons. There had been the grandfather, Alexander, a son, George, still living, the chairman of the plaintiff Company, and his son, the present Alexander Dickson. They carried on business as horticulturists, principally in Newtownards, but also at Ledbury in Herefordshire, and they had a seed business in Royal Avenue, Belfast ; and on the 5th December, 1900, they were incorporated under the name of Alex. Dickson & Sons, Limited. In 1901 they opened a shop in Dawson Street, in this city ; and in 1906, they bought a tract of 17 acres at Blackrock, and established a nursery there. Since 1879 they have been growing pedigree roses, and they have a world-wide reputation as rose growers and sellers, and they have carried off numerous

(1) [1899] 1 Ch. 807.

(2) As to this there was a cross-appeal.

prizes at exhibitions for these roses—it is said 2,800. Thus they had a most valuable trade name.

The defendant came to Dublin about 1875, and he opened a shop in Capel Street some twelve years ago, under the name of the Ashbourne Agricultural Company, and he also put the name Alexander Dickson on the signboard. He carried on the heavy seed business, and did not raise or grow roses, or carry on horticultural business. In 1901 he moved to Parliament Street, and traded there under the name of the Ashbourne Agricultural Co. He did not there use the name Alexander Dickson.

After the plaintiffs opened the shop in Dawson Street it occurred to him that it would be desirable for his trading to go into the nursery business, in order to compete with his new Dublin rivals, and, accordingly, in 1905, he bought for the sum of £1000 the site of a nursery at Woodlawn, Dundrum, which he subsequently called the Home of the Rose. He went into possession in March, and obtained a conveyance on 20th September, 1905, and proceeded to form a nursery there. All this was perfectly legitimate. So things went on till February, 1907; but in that month there was a tender for seeds advertised by the Agricultural Department, and plaintiffs and defendant competed for it. The contract was given to the plaintiffs, and immediately, on the 23rd February, 1907, the defendant advertised himself as Alexander Dickson & Sons, Woodlawn Nurseries, Dundrum. Thus the defendant adopted literally the old and valuable trade name of the plaintiffs expressly for the same business which had made the name famous, and the question which we have to consider is, whether this act was lawful. The Master of the Rolls has granted an injunction against its use.

The appellant's counsel contended that the decision of the Court of Appeal in *Turton v. Turton* (1) was a conclusive authority against the judgment appealed from; but, in my opinion, the facts of the case are in contrast to the present one, and the reasons given by Lord Esher and Cotton, L.J., are all in favour of the Master of the Rolls' judgment. In that case John Turton took his son *bona fide* into partnership, and carried on business as John Turton & Sons. He did nothing, but "he" (to use the

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words of Lord Esher, p. 134) "simply carried on his business with a statement that he is carrying on his business himself as John Turton, and with his sons as partners, which was the accurate and exact truth." I am now dealing merely with the assumption of the name, and especially the addition of the words "& Sons." I shall say something presently as to whether, in addition to all that, the defendant in this case has not garnished the use, and, as Cotton, L.J., points out, has done things besides using the name, in order that the use of that name might look as if it were being used by the old firm.

But to return to the use of the name by itself. Did Alexander Dickson take his sons into partnership at all? So far from doing so, I am forced to the conclusion on the evidence that he put forward a sham partnership, for the dishonest purpose of helping him in the wrongful assumption of the trade name of Alexander Dickson & Sons. He had two sons, Joseph and Alexander. It is proved that in 1903 Joseph wished to be taken into the firm of the Ashbourne Agricultural Co., and the father refused to accede to the request. The son Alexander was a minor in 1907, and is so still. He came home from school in 1906, and in 1907 the father put this boy in as manager at Dundrum, and his son, Joseph, as assistant at Parliament Street. There was, of course, no partnership in law, and there was none in fact. The plaintiffs made the two sons originally defendants on the natural assumption that they were partners, but in answer to a notice served on the defendant's solicitors on the 3rd June, 1907, they replied, "that there was not, and is not, any partnership in the firm of Alexander Dickson & Sons"; and the plaintiffs were obliged to discontinue the action against the two sons.

In the defendant's answer to interrogatories in February, 1908, he said, "There has been as yet no partnership deed. The business was undertaken by me with a view of bringing my two sons up in it, and making a business for them, to which business both my said sons are serving and devoting their entire time and services." That is the utmost to which he will strain his conscience to bring himself within *Turton v. Turton* (1), according

to which we must find a partnership as an "accurate and exact truth."

This would be enough to dispose of the case, but there is much more. The defendant advertised in *Garden Life* in March, 1907, separately for the Woodlawn Nurseries and for the Ashbourne Agricultural Co. He has one—

"IRISH ROSES. Dickson's special offer. Leading varieties.

ALEXANDER DICKSON & SONS, Woodlawn Nurseries,
Dundrum, Co. Dublin, Ireland."

This is an assumption of the plaintiffs' trade name and special trade. And in the issue of the 23rd March, 1907, he has an advertisement from each place as though separate businesses.

"IRISH SEED POTATOES. Dickson's special offer. ALEXANDER DICKSON & SONS, Woodlawn Nurseries,
Dundrum, Co. Dublin, Ireland."

And another—

"IRISH SEED POTATOES. Ashbourne Agricultural Co.,
Seed Potato Specialists, Parliament Street, Dublin."

There are different varieties of seeds in the two, and different prices; but it is proved by Alex. Dickson & Sons that if a customer gave an order at Dundrum the course of business was to send that order for execution to Parliament Street, and have it executed from that place. The Ashbourne house paid for both advertisements. There was no separate book kept. The rule of law as stated by Turner, L.J., in *Burgess v. Burgess* (1) is, "Where a person is selling goods under a particular name, and another person not having that name"—that is where it is not his real name—"is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses." Lord Esher (2) adds for himself—"It looks to me rather as if that would be a *prima facie* case. One name is stamped with a peculiar value which is given to it; another man who has not the name comes and takes that name. I think *prima facie* that would look as if he were doing it for the purpose of representing his goods to be the goods of the other." Every word of that applies to the action of the defendant. What

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(1) 3 De G. M. & G. 905.

(2) 45 Ch. D. 137.

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would be the impression left on the mind of a member of the public who read those two advertisements in *Garden Life* of the 23rd March. Obviously I think that there were two separate businesses, one selling the goods of Alexander Dickson & Sons, and the other selling at Parliament Street as the Agricultural Co. We have it proved by six witnesses that they were deceived by the form of the advertisements, and supposed the Ards firm was the one referred to in the advertisements. We have had much reference to, and comment on, what has been called the trap letter or tricky letter of 15th April, 1907, from Thomas Coulthwaite:—"DEAR SIRs,—Referring to your advertisement in *Garden Life*, March 15, please forward me one dozen dwarf roses. I enclose postal order for 8s. I wish the dozen to include one each of the following roses of your own introduction, viz., Margaret Dickson, Bessie Brown, Mrs. R. G. Sharman-Crawford, Killarney. MESSRS. ALEXANDER DICKSON & SONS, Woodlawn Nurseries, Dundrum, Co. Dublin, Ireland."

The defendant recognized it as a tricky letter, but he rather fell into the trap. He did not acknowledge the roses to be his. He did not answer that, but excused himself from sending them on account of the lateness of the season. He left the man who wrote under the impression that they might be, and asked, "Please say shall we return you the cash sent, or keep your order till next October." Coulthwaite assented to their booking the order for October, but asked to be sent carnations and pyrethums to the value of 8s.; so it ended in defendant accepting the order for next October.

In cases of piracy of a trade-name, it is very usual and not illegitimate to set a trap of this kind, and I am not at all disposed to condemn it. I think it is quite a different matter to go to the former confidential manager of defendant and get his help by information and as a witness against his master, though I do not think in this case Smith has proved against defendant more than would have been established by the other evidence.

Upon the whole case I am of opinion that the judgment of the Master of the Rolls was right, and that the appeal must be dismissed. It is to be regretted that the defendant did not comply with the terms of the plaintiffs' letter of 25th February, 1907.

He sought to justify his action by that of the plaintiffs, in opening up a seed business in Dublin, which forced him, as he wrote, to find other avenues for his business, by which he tells us he meant going into the horticultural business in competition with plaintiffs. This of course he might do, but not by using the plaintiffs' trade-name. This was what plaintiffs called on him to discontinue the use of, and he refused to comply. Plaintiffs replied that to do this—and I agree with them—would be commercial piracy, and hence this action.

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As regards the cross-appeal, we decline to interfere with the order of the Master of the Rolls as to costs. We have during the argument suggested a slight change in the form of this injunction; but this will not interfere with the costs of the appeal, which must be paid by the appellant.

FITZ GIBBON, L.J. :—

I concur in affirming the order of the Master of the Rolls, but I do not regard the variation which we propose to make in its terms as merely formal. I think it is necessary to prevent the order from being used to preclude the defendant from doing what he has a right to do—namely, to trade under his own name as Alexander Dickson. As the order stands, it might be construed as forbidding him to use his own name by itself. As varied, the order will restrain him from using the name of “Alexander Dickson & Sons” as he has hitherto done, because it is not a true description of the person or persons by whom the defendant's business was carried on. It is not true as regards either son. The elder son asked to be made a partner, and he was positively refused. The younger son, who had only just come home from school, was employed by his father about the place at Dundrum. But he had no qualifications as a partner, and the “Sons” can have been introduced only for the purpose of creating confusion. I can not read the advertisements, notably those in *Garden Life*, except as suggesting that the “Alexander Dickson & Sons” who were carrying on business at Woodlawn Nurseries, Dundrum, were not the same people who were trading as the “The Ashbourne Agricultural Company” in Parliament Street, Dublin.

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In the correspondence we find a persistent claim by the defendant to use a name which, on the principles of equity, he was not entitled to use, and the circumstances stated by the Lord Chancellor appear to me to be quite sufficient to sustain the order.

HOLMES, L.J. :—

The plaintiffs in this action are a limited liability company registered in the year 1900, which succeeded to a business said to have been carried on continuously from 1836 under the name of Alexander Dickson & Sons. Down to the year 1880 the seat of this business was Newtownards and consisted principally, if not entirely, of horticulture; and from 1870, the firm commenced the growing of roses, which, in the words of Alexander Dickson, the first witness for the plaintiffs, "has made our name." In 1880 the firm opened a shop in Donegall Street, Belfast, for seed-business only, which was afterwards transferred to the Royal Avenue, in that city. In 1901 the plaintiff Company opened a shop in Dawson Street in Dublin; and in 1906 they established a nursery in Blackrock. I gather from the evidence given on behalf of the plaintiff Company that the most important part of their business has been in garden-seeds and flowers, especially roses, which are tested in their grounds in Newtownards, and sent therefrom to be grown in nurseries in Herefordshire and elsewhere. The statement of claim sets forth, with becoming modesty, that "the business of the plaintiffs was and is a very large and successful one," and that their roses and seeds have had and still have a very large sale, "and have long since acquired an established reputation and character for excellence in the home, colonial, and foreign markets." Notwithstanding formal denials of these statements in the defence, they were never really in controversy. The defendant in a letter written to the plaintiffs before action said, "Your house has been looked upon as a deservedly high-class nursery and garden-seed business;" and the first two witnesses examined, a director and the chairman of the plaintiff Company—gave such an account of the prizes which had been gained by it, and of its high position in horticulture, as could not be traversed.

In these circumstances it was rather a startling thing to have a wholesale rose-grower from Pennsylvania called as the third witness to prove the plaintiffs' reputation on the other side of the Atlantic. The expense attendant on evidence of this nature was wholly unnecessary, and there is no part of the judgment appealed from with which I am so satisfied as that which orders that the costs of this witness, as of all other witnesses subpoenaed to prove the plaintiffs' reputation, but not examined, should be disallowed as against the defendant.

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Having thus described the character of the plaintiffs' business, I come to that of the defendant, who has been engaged for forty years in commercial pursuits, the principal one of which in later times is called the Ashbourne Agricultural Company. Under this name he did a large grain seeds trade with farmers, at first in premises in Capel Street in this city, and since 1901 in Parliament Street. He has always been known by the name of Alexander Dickson, and over the Capel Street establishment there was a signboard with the words "Alexander Dickson, Proprietor." In Parliament Street, the business was only described as the Ashbourne Agricultural Company. Down to 1905, the defendant had no connexion with a nursery, and little, if any, with horticulture; but in that year he acquired lands in Dundrum, County Dublin, for the purpose of entering on this branch of trade. He stated his reason for taking this step in his letter to the plaintiffs of the 26th February, 1907. He says that when the plaintiffs entered into the common heavy seed and grain trade, as they had recently done, and thus cut out those who had hitherto carried on that branch, he was forced to find other avenues of business. The reason thus given is as legitimate as it is candid. The defendant may have followed what has been called a policy of retaliation; but if his policy had been confined to starting the nursery in Dundrum, it would have involved neither moral nor commercial misconduct. The Ashbourne Agricultural Company was not a description well suited for the new business; and it was natural for the defendant to carry it on in a name different from that used by him in the heavy seed trade. There is a great deal to be said in favour of a man who engages in any pursuit using therein his

Appeal. own name. If the accomplished, but rather disreputable, Lord
 1909. Chancellor of King James was the author of the tragedy of
 DICKSON *Hamlet*, as some misguided people think, he would have saved
 v. the world much unconvincing discussion if he had published it
 DICKSON. under the name of Bacon, or St. Albans or Verulam, instead of
 Holmes, L.J. allowing it to appear in the name of one of the best-known men
 in London of the time. The connexion of a Dickson with horti-
 culture is no new thing. In addition to the plaintiff Company,
 there are Dicksons in that line of business in Edinburgh, Man-
 chester, Chester, Belfast, and I believe in other places; and the
 Master of the Rolls very properly declined to restrain the defen-
 dant from selling roses or seeds, not grown or propagated by the
 plaintiffs as Dickson's roses, or Dickson's seeds. If therefore the
 defendant had merely advertised his new business as being
 carried on by Alexander Dickson at Woodlawn, Dundrum, it is
 probable that this action would not have been brought, and, if
 it had, I have no doubt as to how it ought to have ended. I have
 thought it right to state clearly my opinion on this point, to pre-
 vent the decision of the Master of the Rolls and of this Court from
 being used as an authority in cases to which it does not apply; and
 the same consideration has led me to hold that one clause of the
 injunction to which I shall presently refer ought to be omitted.
 Mr. Ronan rested his argument for the plaintiffs upon the use
 by the defendant of, not his own name, but what was in his case
 a fancy name; and the basis of my judgment is that, agreeing in
 this proposition, I hold that the use of the fancy name was in the
 circumstances of the case intended and calculated to injure either
 in a greater or less degree the plaintiffs' business. There was
 nothing in the defendant's action to complain of, down to the
 beginning of 1907.

He then began to advertise in *The Irish Times* and in *Garden Life* his business under the style of Alexander Dickson & Sons, the description by which the plaintiffs' old firm was known down to the registration of the Company in 1900, and which was the foundation of their reputation. I am unable to find, on the evidence given at the trial, that this name and description were taken in good faith. The defendant had two sons, one of age and

one a minor; but no partnership was contemplated, discussed, or talked about before this action. I gather that the elder, who had been assisting his father for some years, had been anxious to be accepted by him as a partner, or, at least, to have his name in the business; but the father would not consent. The younger son had only left school a short time before, and could have known little or nothing of gardening. It is notable that the announcement of this new title synchronizes with a contract for the supply of heavy seeds made between the plaintiffs and the Department of Agriculture in Ireland—a contract which in previous years had been obtained by the defendant. This annoyed the latter, and was calculated to have led him to an unjustifiable reprisal.

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There is no evidence that the plaintiffs sustained any serious injury by the action of the defendant. I agree with the Master of the Rolls that their trade reputation has been exaggerated, and the evidence leads me to think that, such as it is, it has been principally associated with Newtownards. It is probable that the majority of persons interested in horticulture have never heard of them. Still they are known to many customers, and enjoy a business reputation that ought to be protected against piratical aggression. The true point for consideration is whether the defendant intended such aggression, not whether he succeeded in it. I am of opinion that he did; and I draw this inference from—(1) the adoption of a title for his business inconsistent with the truth; (2) the practical identity of that title with the trade description of the plaintiffs; (3) the time and circumstances under which he took the title; (4) his correspondence with the plaintiffs before action; (5) his remarkable letters in reply to Coulthwaite; and (6) the character of his advertisements in *Garden Life*. I do not propose to discuss these matters in detail, but I feel bound to say that I cannot agree with the denunciation by the Master of the Rolls of the Coulthwaite trap. If fraud and crime are to be detected, it is often necessary to have recourse to device. This particular device was clumsy and transparent; but the defendant's reply, notwithstanding his doubt of the genuine character of the first letter, shows his eagerness to get business at

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the expense of the plaintiffs. I think the approach to Smith, the defendant's old servant, was a more questionable proceeding; but his evidence does not seem to me to go much further than what was admitted by the defendant himself.

For these reasons I hold that the judgment appealed from is substantially correct, but it contains one clause calculated to lead to confusion, if not to injustice. It is that in which the defendant is restrained from using any style in which the name of Dickson appears, without taking certain precautions. I am of opinion that this ought to be omitted; nor will such omission prejudice the plaintiffs, as what follows is amply sufficient for their protection.

The order of the Court of Appeal directed the words "or seedsman" to be inserted in the judgment (*ante*, p. 186), after the words "carrying on the business of nurseryman," and the words within brackets to be omitted.

Solicitors for the appellants : *Shean & Dickson.*

Solicitors for the respondents : *Redington & Sainsbury.*

W. G.

IN THE MATTER OF THE ESTATE OF WILLIAM H. H.
BARTON.

Ross, J.
1909.

May 4.

Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 48, sub-s. 4
—Estate—"So circumstanced that it would . . . be sold without the consent
of the owner as to price"—Date of ascertainment.

The date of sale is the date to be applied in considering whether an estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, within the meaning of section 48, sub-section 4, of the Land Act, 1903.

An absolute order for the sale of an estate by the Land Judge was in force at the date of the passing of the Land Act, 1903, the estate being then insolvent. The petition for the sale of the estate was dismissed on 11th November, 1903. The owner subsequently took proceedings in the Land Commission, and sold the estate to the tenants under the Act of 1903. At the time of the proceedings and sale in the Land Commission the estate was solvent:—

Held, that the exceptions in section 48, sub-section 4, of the Land Act, 1903, did not apply, and that the bonus was payable.

FINAL SCHEDULE OF INCUMBRANCES.

In February, 1903, a petition for the sale of the estate was presented by an incumbrancer in the Land Judge's Court. The conditional order was made absolute on the 17th April, 1903. On the 11th November, 1903, the petition for sale was dismissed on the consent of all the incumbrancers. At the time of the Land Judge's proceedings the rental of the lands the subject of said proceedings amounted to £1023 11s. per annum, while the annual outgoings to which all the lands were then liable amounted to £1820 11s. per annum, which included a jointure of £500 per annum payable to the vendor's mother, a life annuity of £150 payable to the vendor's aunt, an annual instalment of £52 13s. 6d. in lieu of ecclesiastical tithe rentcharge, a head rent of £27 14s.; and the remainder of the sum of £1820 11s. represented interest on incumbrances.

Subsequently to the petition for sale being dismissed, but before the institution of the proceedings for sale in the Land Commission,

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the *puisne* incumbrancers on the lands agreed to apportion their charges as between the lands sold in the present matter and other lands subject thereto; and the vendor's mother and aunt, who had not been receiving anything on foot of the jointure and annuity, released the lands from same. As a result of such apportionment and release, the lands sold, in the present matter, were at the time of the institution of the present proceedings solvent as to capital. With regard to income, the rental of the lands immediately prior to the institution of the present proceedings amounted to £842 19s. 8d., while the annual outgoings amounted to £880 17s. 7d., calculated on the basis of interest on all the incumbrances being payable at the full rates payable; but as certain of the *puisne* incumbrancers were satisfied to accept interest at the reduced rate of $2\frac{1}{2}$ per cent., the outgoings in fact amounted only to £766 8s. 8d. per annum.

The vendor now applied for payment of the bonus or percentage from the Land Purchase Fund in respect of the estate sold in the matter.

Matheson, K.C., and *E. S. Murphy*, for the vendor :—

The present case resembles cases arising on the construction of section 48 (1) of the Act of 1903. With reference to the words "so incumbered" in section 48 (1) it has been held that the crucial time is the date of sale: *In re Bandon's Estate* (1).

Serjeant O'Connor, K.C., and *Dudley White*, for the Treasury :—

It is very doubtful whether the estate is even now solvent. There are five dates that might be suggested as the particular date intended by sect. 48, sub-sect. 4. 1. The date of the absolute order for sale in the Land Judge's Court. 2. The date of the sale under the absolute order. 3. The date on which the Land Act, 1903, came into operation (1st Nov., 1903). 4. The institution of the proceedings for sale in the Land Commission. 5. The date of sale in the Land Commission. We say that the last two dates are not contemplated by the sub-section. The sub-section in effect says there shall be no bonus if there was an absolute order for the

sale of the estate at the time of the passing of the Act, and if at that time it was so circumstanced that it was insolvent. Some date is contemplated prior to the Land Commission proceedings. The object of the sub-section was to defeat what has happened in the present case. This is the same estate and not a different estate, as *In re Carroll's Estate* (1). *In re Bandon's Estate* (2) was with reference to sub-section 1, and was decided only after grave doubt.

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Ross, J. :—

In this case there has been a sale under the Act of 1903. Under these circumstances the general rule is that a bonus is to be paid, whether added to the purchase-money or paid to the vendor for his own use. The evidence is uncontradicted that the estate was solvent to some extent at the time of the sale to the Land Commission. How the solvency was brought about, it is not for me to inquire. If the relatives of the owner have made it solvent by releasing their annuities, there is no provision differentiating such a case from an ordinary case of solvency. The bonus is payable unless the Treasury get within the exceptions contained in sub-section 4 of section 48 of the Act of 1903, which enacts that the bonus section shall not apply to any estate sold by the Land Judge, where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, or to any estate so circumstanced in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Act of 1903.

Now, undoubtedly, there was an absolute order for the sale of the estate at the time of the passing of the Act. But the Treasury must also show that it was so circumstanced that it would be sold without the consent of the owner as to price. The question arises as to the time when the estate was "so circumstanced." There are two parts to the sub-section: each contemplates the case of an estate ordered to be sold in the Land Judge's Court. The first part deals with the case where

(1) [1906] 1 I. R. 661; [1907] 1 I. R. 148. (2) [1907] 1 I. R. 226.

Ross, J. the actual sale takes place in the Land Judge's Court. It is
1909. admitted that in the first case the date when the estate was
In re "so circumstanced" is the date of sale. The second part con-
BARTON'S templates the estate being taken out of Court, and sold under
ESTATE. the Land Purchase Acts. Unfortunately the expression "so
circumstanced" is again used, and its meaning is not very
clear when applied to an estate sold out of Court. I think it
simply means "insolvent." The words, "At the date of the
passing of the Act" are not used in connexion with the expression
"so circumstanced." I think the crucial time in the second part
is the same as the time indicated in the first part, namely, the
date of sale.

This construction gives some sense to the whole sub-section.
The owner is to have the stimulus of the bonus, so long as he
has a voice in deciding whether the estate is to be sold or not.
If the estate is solvent, he has a right to be heard up to the time
when the sale takes place, and the bonus is given to encourage
him to sell. If the estate is insolvent at the time of the sale,
he has no right to be heard at all, and he does not get the bonus.
I think the Treasury have failed to bring the case under the
terms of the sub-section, and therefore the bonus is payable.

Solicitors for the vendor: *H. & W. Stanley.*

Solicitor for the Treasury: *W. G. Towers.*

D. M. S.

IN THE MATTER OF THE ESTATE OF ELIZABETH JANE
BRABAZON, DECEASED; AND IN THE MATTER OF THE
SETTLED LAND ACT, 1882.

Ross, J.
(for Barton, J.)
1909.
June 8.

Settled Land Acts—Infant contingently entitled to the fee—Sale—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60.

In the case of an infant not entitled in possession during infancy, but only contingently entitled to an estate in tail on his attaining twenty-one years of age, the Court, on the application of the infant, and of the person entitled to the rents and profits of the lands pending the majority of the infant, made an order directing that the powers conferred upon a tenant for life by sections 3 and 4 and 16 to 20 of the Settled Land Act, 1882, might be exercised by the next friend of the infant on behalf of the infant during his minority.

APPLICATION by summons on behalf of Robert Chaloner Lindsey (by the Rev. Charles E. C. Lindsey, his next friend), being the person entitled in tail contingently on his attaining the age of twenty-one years, and on behalf of Madelina V. R. Brabazon, the person entitled to the rents and profits of the estate pending the majority of Robert Chaloner Lindsey, for an order that the powers conferred upon a tenant for life by sections 3 and 4 and sections 16–20 of the Settled Land Act, 1882, might be exercised by the Rev. Charles E. C. Lindsey on behalf of Robert Chaloner Lindsey, during his minority.

By deed of family settlement, dated 6th May, 1859, and made between William Henry Brabazon and others, William Henry Brabazon granted to trustees certain lands known as the Brabazon Family Estate, to hold to the use of the said William Henry Brabazon for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail, with remainder to Elizabeth Jane Brabazon, her heirs, and assigns for ever.

Elizabeth Jane Brabazon executed her will on the 17th February, 1897, whereby, after making certain bequests, she gave, devised, and bequeathed all her property, real and personal (except the family estate of which her brother, William Henry

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Brabazon, was then tenant for life), unto Madelina Victoria Rose Brabazon, as sole residuary legatee, and as to the said family estate, she devised the same to trustees to the use of the first and other sons of the Rev. Charles Lindsey successively in tail male on their attaining the age of twenty-one years. By a codicil to her will, dated the 7th September, 1901, testatrix, reciting that she was entitled to Rath House and the lands of Davidsrath, containing about 68 acres as judicial tenant, subject to a rent of £134, bequeathed the same to the trustees of her will upon trust to pay the headrent and observe the conditions incident to said tenancy, and, subject thereto, upon trust for William Henry Brabazon for life, and, subject thereto, to hold the same upon such trusts, and subject to such powers and provisions as should correspond with the trusts by her said will declared concerning her freehold estate, as nearly as the different tenures of the premises and the rules of law and equity would permit, but so that the same should not vest absolutely in any person by her said will made tenant in tail male by purchase of the said freehold premises, unless such person should attain the age of twenty-one years, but at the death of such person under that age should devolve in the same manner as the same would have done had they been freeholds of inheritance included in the devise in strict settlement before mentioned.

Testatrix died on the 19th March, 1903. William Henry Brabazon died on the 4th January, 1908, without issue, whereupon the limitations granted by the deed of the 6th May, 1859, prior to the estate in fee-simple thereby given to Elizabeth Jane Brabazon, terminated, and the freehold estate thereupon became liable to the trusts declared by her will.

It appeared that the freehold estate was very heavily incumbered, and that, if the lands were sold, the proceeds could be applied in paying off the charges, and also in payment of Crown duties leviable upon the death of William Henry Brabazon, some of which were chargeable against the fee of the estate. If the sale were effected, the income derived from the estate would be considerably improved, and the estate be placed upon a sounder financial basis.

G. W. Walker, K.C., for the applicants :—

It has been decided that section 59 of the Settled Land Act, 1882, does not apply where an infant is contingently entitled. The present application is not under section 59, but under section 60 (1) : *In re Bennett's Estate* (2).

A similar order was recently made in the case of *King-Harman v. Cayley* (3), and the order in that case recited that the infant "would, if he were of full age, have the powers of a tenant for life under the provisions of the Settled Land Act, 1882."

Ross, J., made an order directing that the powers conferred upon a tenant for life by sections 3, 4, and sections 16-20, both inclusive, of the Settled Land Act, 1882, might be exercised by the Rev. Charles E. C. Lindsey, on behalf of Robert Chaloner Lindsey during his minority.

Solicitors for the applicants : *S. & R. C. Walker & Son.*

D. M. S.

(1) Section 60 of the Settled Land Act, 1882, is as follows :—

"Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

(2) 39 I. L. T. R. 229.

(3) Not reported.

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M. R. IN RE ABBEYLEIX RURAL DISTRICT COUNCIL AND
1908. WHITE.

Nov. 9, 24,
28.

Local Government Board—Arbitrator—Award—Compulsory taking of lands—Compensation over £60—Payment out of Court—Tenant for life of settled estate—Trustees—Labourers Act, 1906 (6 Edw. 7, c. 37)—Lands Clauses Consolidation Act, 1845, ss. 69–72, 81.

Lands were being compulsorily taken for the purposes of an improvement scheme under the Labourers Acts, and the arbitrator of the Local Government Board awarded an aggregate sum exceeding £60 as compensation for five plots in respect of the interest of the lessor of a lease under which the lands were held.

The tenant for life of the lands under a settlement claimed the whole sum, on the ground that it was made up of five several sums, payable as compensation for five separate plots, each less than £60 :—

Held, that the compensation awarded was payable to the trustees of the settlement, and not to the tenant for life, under section 11 of the Labourers Act, 1906.

SUMMONS.

The Abbeyleix Rural District Council compulsorily took six plots of land, portion of the Ashbrook estate in the Queen's County, under the provisions of the Labourers Acts. Five of these plots were on a portion of the estate to which Lord Ashbrook was entitled as tenant for life, subject to a lease for lives and years made to Patrick Hare, dated the 22nd February, 1859, and at the time of this application vested in the Hon. Mrs. White.

The Local Government Board arbitrator, by his award, awarded £210 compensation for the five plots compulsorily taken, and made the following apportionment :—£120 for the interest of the lessor in the lease of 1859 ; and £90 compensation for the interest of the lessee in that lease. The Rural District Council lodged the total amount awarded for compensation in Court.

The sum of £120 was claimed by the trustees of the settled estate, as representing the lessor's interest. Lord Ashbrook, as

tenant for life, claimed the whole sum, on the ground that this amount was made up of compensation for separate plots, which in each case was less than £60.

Application was made for the payment out of the money lodged in Court.

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A. D. Bolton, for the Hon. Mrs. White, who represented the interest of the lessee in the lease of 1859, asked for payment out of the sum of £90, which the Master of the Rolls ordered to be paid to her, with costs.

Chaytor, K.C. (with him *C. Fforde*), for Lord Ashbrook :—

As regards £120, the balance of the money in Court, the question for decision is, What is the “purchase-money or compensation” payable under the 11th section of the Labourers (Ireland) Act, 1906? We submit that it is not the total compensation awarded in respect of all the plots; but that the compensation awarded for each plot must be treated as separate from, and not identical with, that awarded in respect of any other plot. Therefore, Lord Ashbrook, as tenant for life, and not the trustees of the settlement, is entitled to the sum of £120, in respect of the lessor’s interest in the lease of 1859. The Labourers Acts treat each plot as a separate and distinct entity. Each plot must be separately specified in the scheme, and each plot may be the subject-matter of a separate appeal. Therefore, each item is to be taken as a separate award; and the compensation for each plot is distinct from that given for the other plots taken for the same scheme.

The policy of the Labourers Act, 1906, was to simplify and cheapen investigation of title, and to expedite the compulsory acquisition of land. If the contention of the trustees be right, this policy will be rendered nugatory, because, if the compensation for a single plot exceeds £60, the title to the whole estate must be investigated by the council, with the result that the cost, in many cases, will be largely in excess of the compensation awarded.

The arbitrator has no doubt not made separate awards in respect of each of the five plots compulsorily taken, but an arbitrator, though at liberty to frame his award so as to suit his

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own convenience in a particular way cannot by so doing alter the rights of the parties: *Ex parte Birch* (1). Cases under section 63 of the Land Purchase Act of 1903 are somewhat analogous. It sometimes happens that on the same estate the same person is owner of different superior interests, and although the aggregate prices for the superior interests collectively may be far in excess of £30, nevertheless, if the redemption price of each superior interest is under £30, the tenant for life is entitled to the total redemption price. Similarly, there may be one superior interest payable out of an estate being sold at different intervals of time far in excess of £30. Nevertheless, if less than £30 is payable on the occasion of each allocation, the owner of the rents and profits for the time being is entitled to receive the same. In *Dunmanway Union v. The Earl of Bandon* (2), the Vice-Chancellor decided that, though the aggregate amount of compensation awarded exceeded £200, yet, as the compensation for each plot was under £20, the entire sum should be paid to the tenant for life without any undertaking on his part to expend it in permanent improvements, as if it were capital money under the Settled Land Acts.

Corvan, for the trustees:—

The “purchase-money or compensation” in this case exceeds £60, and must be paid to the trustees. The total sum awarded in respect of the five plots in question taken under this scheme must be regarded as the compensation payable. There is one title, and one estate, and one award: *Ex parte Birch* (1). Even if there was a separate award for each plot, the compensation in this case could only be treated as one award for the purpose of determining the rights of the parties under section 11 of the Act of 1906. See also sections 6 and 28 of that Act, and section 3 of the Act of 1896, sections 12 and 15 of the Act of 1886, and sections 16, 19, and 20 of the Act of 1885.

Ex parte Lyle (3), and *Ex parte Givcen* (4), are cases which show that sums exceeding £30 paid into Court, as purchase-money under the Labourers Acts, will only be paid out to tenants for

(1) [1894] 2 I. R. 181.

(3) [1903] 1 I. R. 445.

(2) 24th April, 1903.—Unreported.

(4) *Ibid.* 447.

life, on their undertaking to expend the money in permanent improvements on the settled lands.

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The order in *Lord Bandon's Case* (1) was made on consent; and in *Ex parte Fitz Herbert* (2) the summons asked for payment out to the applicant on his undertaking to apply the money in permanent improvements on the estate to which he was entitled as tenant for life.

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AND WHITE.

D. J. O'Brien, for the District Council.

THE MASTER OF THE ROLLS:—

Nov. 28.

This is an extremely difficult question, and it is obvious that any decision of mine may give rise to discussion elsewhere. It should be not merely in the interest of the parties to the present proceedings, but in the interest of all concerned in the administration of the Labourers Acts, that the point discussed before me should be finally and conclusively determined.

I appreciate to the full the view that has been acted on by the Local Government Board; the view so clearly put forward by Mr. Chaytor; the view pressed by Mr. O'Brien in the interests of economy and expedition; for I think there is no doubt that, so far as the Rural District Council and the ratepayers are concerned, it would be cheaper and quicker to deal with each particular plot as a separate entity, not merely for the purpose of localizing the particular plot sanctioned by the Local Government Board, but also for the purposes of compensation. I apprehend it is very unlikely that there would be a case in which the compensation for one particular plot would exceed £60. I see no probability of it, having regard to the figures in this case; nor have I been convinced that the limit of £60 mentioned in the section was arrived at by reference to the largest possible price—the maximum limit of compensation—that could be awarded for one plot. I think it was arrived at by the simple process of doubling £30, which limit was adopted in analogous cases by Courts of Equity, and even by the Legislature itself. Under the Lands Clauses Acts (I refer, of course, to the group of sections commencing with section 69,

(1) Unreported.

(2) [1902] 1 I. R. 6.

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Act of 1845) it is familiar learning that in cases where the purchase-money or compensation exceeds the sum of £20, such purchase-money or compensation must be dealt with in one of two ways. If, though above £20, it is below £200, section 71 of the Lands Clauses Consolidation Act, 1845, is applicable. If the purchase-money amounts to or exceeds £200, then the purchase-money must be paid into Bank, and invested or dealt with by the Court according to the provisions of the statute. But in cases where the purchase-money does not exceed £20 the money shall be paid, "under the 72nd section, to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable for their own use and benefit"; or (in case of incapacity) then as the section directs.

That is the genesis of the invasion of the rights of remaindermen. It started with the small beginning of sums not exceeding £20; between £20 and £200 the estate got the benefit. "The money so paid to such trustees, and the produce arising therefrom, shall be by such trustees applied in the manner hereinbefore directed."

Now, that £20 limit was for the first time extended in 1850, in *Ex parte Barrett* (1). In that case, though the residue after necessary payments came to £30, the Court allowed the £30 to be paid to the tenant for life, but only on his undertaking to lay it out in permanent improvements.

In the year 1901, a case under the Labourers Act (*In re Navan Rural District Council; Ex parte Fitzherbert* (2)), came before the Vice-Chancellor. The total amount of money lodged in Court amounted to £30; consents were produced, and the Vice-Chancellor made an order for payment to the tenant for life under the settlement, without requiring any undertaking, but the application was made by the tenant for life for payment out, "he undertaking to apply the same in permanent improvements on the Black Castle estates," and his affidavit, on which the application was grounded, stating that "he was desirous either that the said sum of £30 should be paid out to him for the purpose of effecting some permanent improvement on the said Black Castle

(1) 19 L. J., Ch. 415.

(2) [1902] 1 I. R. 6.

estates, which he thereby undertook to effect; or that it might be invested, and the dividends paid to him during his life."

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The reporter says:—"The Vice-Chancellor made an order for payment out to the applicant, without requiring any undertaking." That must mean "without requiring any *further* undertaking than the oath of the gentleman making the application."

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Mr. Corvan cited two cases in which Sir A. Porter, Master of the Rolls, paid out £76 16s. 4d., and £41 17s. 4d. lodged in Court as purchase-money, to tenants for life, on their undertakings to expend the moneys in permanent improvements. In both cases the arguments are not reported. The latter-day system of reporting merely the decision of the Court, without the arguments of counsel, is not a good one. The great value of the old reports is that the arguments of counsel were fully reported. In the first case, before the Master of the Rolls (1), the Vice-Chancellor's case was referred to, and it was said by counsel, "The applicant is willing to give such undertaking if required"; and he referred to the Lands Clauses Consolidation Act, 1845, sections 69-72, and to the Settled Land Act of 1882, sections 21, 25, 32. In the second case (2) the Master of the Rolls was referred by counsel to the first case, and so the second case rests on the first. In that he also required an undertaking. To my mind it is clear that it was the Settled Land Acts which operated on the mind of the Master of the Rolls, and especially section 21 of the Settled Land Act, 1882. [His Lordship referred to the orders in each case.]

I allude to these two cases for the purpose of showing that the old limit of £20 was extended to £30 in cases where the recipient bound himself to expend the money in permanent improvements, as if it were capital money under the Settled Land Acts. I am not aware that till the Land Act of 1903 the limit of payment to the tenant for life for his personal benefit was extended to £30; but under section 63 of that Act it was provided "where any superior interest, or an apportioned part thereof, is redeemed under the Land Purchase Acts, and the redemption price does not exceed thirty pounds, it may be paid to the person in possession or in receipt of the income of the superior interest

(1) *Ex parte Lyle*, [1903] 1 I. R. 445.

(2) *Ex parte Given*, *ibid.* 447.

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for his own benefit. . . . If the redemption price exceeds thirty pounds, but does not exceed one hundred pounds, it may be paid to the person in possession or in receipt of the income of the superior interest, or to trustees to be appointed or approved by the Land Commission or the Land Judge, as the case may be, upon the undertaking in the prescribed manner of such person, or of such trustees, to apply the redemption price as if it were capital money arising under the Settled Land Acts, 1882 to 1890."

It seems to me clear that the draftsman of that section had in his mind the decision of the Vice-Chancellor already referred to, and the decisions of the Master of the Rolls in *Ex parte Lyle* (1) and *Ex parte Givven* (2). So we may assume that the section was passed for the purpose of giving legislative effect to the decisions of the Vice-Chancellor and the Master of the Rolls, but so far only as the limit did not exceed £30—if it did exceed £30, it was only on the undertaking of the tenant for life to expend in permanent improvements that it was paid out to him. The Legislature refused to go beyond £30 in the personal interest of the owners of estates and in the like interest of tenants for life of superior interests. No doubt, the consequence of that section must be—indeed, speaking with some knowledge of its working from 1903 to 1906, I am aware—that a tenant for life might from time to time obtain £30, or under, for his own use and benefit; and there have been and must be cases where the owners of vast superior interests extending over many estates have had and will have these superior interests apportioned, and yet I find it impossible to say that the section does not apply in the case of successive redemptions and apportionments under section 63. After all, the argument based on supposed injustice to remaindermen is unnecessary, to say the least of it. The very same thing might have occurred in the taking of lands under the Lands Clauses Acts. Railways are made, but also extended; waterworks started on a small scale increase—look, for instance, at what has been done in Belfast; and it is quite possible that the provisions as to the £20 and £200 limit might arise in many cases. The principle remains; the maximum limit of personal benefit to limited owners is raised from £20 to £30.

(1) [1903] 1 I. R. 445.

(2) *Ibid.* 447.

Well, come now to the Labourers Acts—the Labourers' code. There is no doubt that the Legislature went as far as it could in endeavouring to make a working code, an efficient code, and to keep down costs and expenses; and the 11th section of the Act of 1906 provides (sub-section 1)—“Where the purchase-money or compensation payable to a person claiming any interest in land does not exceed the sum of £60, and the claimant gives *prima facie* evidence that he is a person having power to sell under the Land Purchase Acts, and satisfies the District Council that for not less than six years immediately preceding he, or his immediate predecessor in title, has been personally or by an agent in receipt of the rents or profits of the land or in actual occupation thereof, the claimant may be dealt with by the District Council as the absolute owner of the interest in respect of which he claims, and the purchase-money or compensation may be paid to him”; and sub-section 2 is as follows:—“Where any interest in land, in respect of which purchase-money or compensation not exceeding the sum of £60 is payable, is subject to any mortgage or charge, the amount of the compensation may be paid to the person entitled to the mortgage or charge, or if there is more than one such mortgage or charge, then to the person entitled to the mortgage or charge which is first in priority, and the amount so paid shall be received in reduction of the principal sum for the time being owing in respect of the mortgage or charge, notwithstanding any direction, proviso, or covenant to the contrary contained in any instrument.”

This second sub-section aimed at avoiding what was often found to be a difficulty, of inducing large mortgagees to accept small sums of money. The provisions of sub-section 3 are ancillary to the provisions referred to, and the provisions of sub-sect. 4 do not help the construction on which the whole question turns. But the provisions of sub-section 8 and sub-section 9 appear to me to be all-important.

Sub-section 9 is to be read as if £60 was substituted for £20 mentioned in section 72 of the Lands Clauses Consolidation Act. If under the Lands Clauses Consolidation Act the compensation was determined by award and the amount paid into Court, no one would dream of putting forward the argument that you were to

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split up the compensation money in reference to each plot and pay out £20 or less to the tenant for life. Why should such an argument have weight in the case of sub-section 9 of section 11, which provides that section 72 of the Lands Clauses Consolidation Act, 1845, was to have effect as if £60 was substituted for £20? That was made £30 by the decision of the Vice-Chancellor and the Master of the Rolls; and the utmost limit you can go to under the Labourers Acts for the personal benefit of the tenant for life is £60.

In aid of that interpretation, Mr. Corvan refers to the 8th sub-section of section 11, and it is difficult to resist the cogency of his argument:—"If it appears to the District Council that the person making any claim for compensation in respect of land, or in respect of any estate or interest therein, is not absolutely entitled to the land, estate or interest, in respect of which his claim is made, or if the title to such land, estate or interest is not satisfactorily deduced to the District Council, then, if the total amount of such compensation does not amount to £100 and exceeds £10, the District Council may pay the compensation into the County Court, and that Court shall thereupon have, with respect thereto, all the jurisdiction exercisable by the High Court under the Lands Clauses Acts."

It is manifest in that sub-section that compensation in respect of land, "or in respect of any estate or interest therein," must mean the whole compensation payable in respect of land compulsorily taken under a scheme, and the County Court could not have jurisdiction by splitting up the compensation in respect of each plot, with the unfortunate result that if there were four plots taken, all held under the same title, there would have to be four different and separate payments into the County Court, and there would have to be perhaps four separate and distinct applications for payment out. But when sect. 11 is read in connexion with the whole scheme and as part of the code, and when you take the opening words—"For the purpose of taking land otherwise than by agreement under the Labourers Acts, the Lands Clauses Acts, as amended by the second schedule to the Housing of the Working Classes Act, 1890, shall be further amended as follows"—it becomes clear to demonstration that "land" and "compensation" payable to a person

“claiming any interest in land” refer to land taken under the scheme, whether it may consist of one acre or ten acres. It never was intended by that Act of Parliament that one man was to minister to all the needs of the district, or that the lands of any individual landlord or tenant should be devoted to the exclusive purpose of labourers’ cottages, though in the admirable work of Mr. Bolton I am sorry to see a reference to some cases where it was proposed to take the best of the land, leaving the poorest and worst in the possession of the tenant.

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Coming to *Ex parte Birch* (1) I think the case is one of the utmost importance to both sides. It carries Mr. Chaytor all the way on one point of his argument, but is altogether against him on another. It is a definite authority that an arbitrator cannot by manipulation (I use the word in no disparaging sense), by any grouping of figures or amounts, deprive a party of the remedies and rights conferred on him by the Legislature; and whether or not the arbitrator groups a number of items under one head, or sets them out separately, he cannot deprive a person of the right of appeal by any action of his. In *Birch’s Case* (1) the question which actually arose was the converse of the present case. The arbitrator set out separate awards, with the result that the person entitled was awarded several sums amounting in the aggregate to more than £1000, but each severally under £1000. The Queen’s Bench held that no arrangement of the award could deprive a person of his right of appeal; and Holmes, L.J., says:—“Five sums of money are awarded to him for this estate, and whether the arbitrator adds them together or not, the total of those sums is the compensation payable to him.” Gibson, J., says:—“As to the point that the aggregate amount awarded is what decides the right to appeal, where there is one estate, one title and one award”—I emphasize these words—“I am inclined to agree with Mr. Campbell’s argument. It would be curious if the right of appeal depended on the accidental circumstance of the number of tenancies and the mode of assessment adopted by the arbitrator for his own convenience. The fee-simple of the estate taken from the owner is what is to

(1) [1894] 2 I. R. 181.

M. R. be valued. It might be different if there were different titles
 1908. and estates. It is, however, unnecessary now to decide this
In re point.”

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In the result it appears to me that though the case was decided under the Housing of the Working Classes Act, yet, having regard to the incorporation of the second schedule of this Act of 1890 with the Labourers Code, the case, while in favour of Mr. Chaytor on one point, is against him as being a clear indication of the opinion of the Judges that the compensation payable under an award, where there is one estate, and one title and one award, is the aggregate amount awarded; and if the compensation be separately assessed under the Labourers Acts, or grouped as in the present case, it cannot affect the question. I decide the case irrespective of the form of the award. The arbitrator is only carrying out the obvious duty cast on him by the whole code to make the award separately. I am particularly anxious to make this point clear. I had before me the other day the question of identification of particular sites, and the greatest care is exercised by the Local Government Board to see that each site is kept distinct, and to my mind it is absolutely necessary that this should be done.

Where land is being compulsorily taken, it is simply elementary justice to ask, “How much are you giving me for every portion of my estate, for each and every plot I may have?” It is satisfactory for a person to know this when his estate is being taken.

As regards the *Bandon Case* (1) cited by Mr. Chaytor in his very able argument, it was not decided under the Act of 1906, and is unreported, and I do not feel at liberty to look at the affidavit.

I have arrived at the conclusion that the aggregate amount of the award must be paid to the trustees of the settlement.

Solicitor for Mrs. White: *John Lanigan.*

Solicitor for Lord Ashbrook: *James Harte.*

Solicitors for the trustees: *Toomey & Barbor.*

Solicitor for district council: *P. J. Meehan.*

R. W. L.

O'FLAHERTY, LANDLORD ; KELLY, TENANT (1).

Appeal.
1909.*Landlord and tenant—Land Acts, 1881-1896—Fair rent—Agistment—
Bona fide occupation.*May 13.
June 7.

A tenant of agricultural lands, from the time he became owner of the tenancy, let the grazing of the lands each year in agistment, and for a number of years preceeding the date of the originating application the grazing tenant was not called upon to remove his cattle at the end of his term, he having then made a fresh bargain for the next year :—

Held, that the tenant was not by such lettings necessarily debarred from having a fair rent fixed in respect of his holding.

APPEAL by the landlord, W. O'Flaherty, from an order of the Chief Commission remitting the case to the Sub-Commission to fix a fair rent on the tenant's holding for a second statutory term.

The fair rent of the holding, which contained 103A. 2R. 25P., was fixed by the Land Commission for a first statutory term on the 1st day of March, 1889, at £75, one Anne M'Hugh being then the tenant. The present tenant, Michael Kelly, an official in the Legacy and Succession Duty Office in Dublin, succeeded Anne M'Hugh as tenant in April, 1889, and as he lived in Dublin, he let the lands for grazing on the eleven months' system from that time on. Kelly paid the rent and taxes; a herd who lived in a cottage on the lands was paid no wages, but was allowed to occupy two acres for tillage and potatoes, and, save a few acres let in conacre, the entire lands were let for grazing as aforesaid. In 1889 the letting was to three persons in divisions, in 1890 to one, and from 1891 to 1898 the same person took the grazing. In 1899, 1900, and 1901 the letting was to several persons, but from 1902 to the date of the originating application, the letting was made each year to one Michael Mooney, at a rent of from £110 to £115 in each year. Mooney meadowed a small portion of the

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Appeal. lands, but no part of the meadow was taken away; and no por-
 1909. tion of the lands was tilled by him.

O'FLAHERTY, The last advertisement of the lettings was published in 1902,
Landlord; and was headed:—"To let, for grazing, from 1st April, 1902, to
 KELLY, 28th February, 1903, part of the lands of Largan," &c., and it
Tenant. contained the following statement: "The lands will be let either
 as a whole to one or more persons, or in divisions to suit
 purchasers."

A number of letters which passed between Kelly and Mooney
 in 1902-1906 were put in evidence, of which the following are
 examples:—

On the 24th March, 1902, Mooney wrote to Kelly:—"I hope
 you will let me know by return if your farm at Largan is to let;
 if so, please let me know your price for it . . . if any portion of it
 is let, it would not suit me." To which Kelly replied on the
 25th March, that he would be glad to deal with Mooney, stating,
 "half the rent to be paid now, the balance next November."

On the 30th October, 1902, Mooney wrote:—"Please find
 enclosed a bank draft for £55, being a half-year's rent for the
 farm of Largan. I would consider it a favour if you would let
 me know if you would be willing to take me as tenant for another
 year. . . ."

To this letter Kelly replied stating:—"I shall be glad to have
 you as a grazing tenant for the season from the 1st April, 1903
 to 1904, but not at £110, which I consider too low."

On the 1st July, 1903, Mooney wrote:—"I beg to say that a
 great part of the farm is overrun with weeds, thistles, and ferns,
 it needs cutting them very much; all the landlords about here do
 pay for clearing their lands every year."

On the 4th February, 1904, Mooney wrote:—"I hope you
 will let me know if you are inclined to let me have the Largan
 farm for another term."

It appeared that Mooney was not called upon to remove his
 cattle each year, he having made a fresh bargain for the ensuing
 season, before the completion of the current eleven months.

The Sub-Commission dismissed the tenant's originating notice,
 and on appeal the Commission remitted the case to the Sub-Com-
 mission as above stated. Hence this appeal.

Fetherstonhaugh, K.C., for the appellant :—

A fair rent should not be fixed ; Kelly never was in *bona fide* occupation, which implies a use and enjoyment of the lands in fact, not a mere legal right of possession ; see judgment of Lush, J., in *The Queen v. St. Pancras Assessment Committee* (1) ; here for twenty years the lands have been farmed by some one else, and Kelly has merely been in receipt of a profit rent.

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O'FLAHERTY,
Landlord ;
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Tenant.

In *Meath, Tenant ; Megan, Landlord* (2), Bewley, J., said : “The benefits conferred on tenants by the Act as to free sale, fixity of tenure, fair rent, and land purchase are confined to occupying tenants, and the tenancies referred to in the Act, whether present or future, fixed or under judicial lease, are tenancies of persons in occupation of their holdings. Occupation is, in fact, the key-note of the Act in the provisions which it makes for tenants.” It is the “tenant” of a present tenancy who is empowered to apply under section 8 of the Law of Ireland Act, 1881, to have a fair rent fixed, and, by section 57 of the same Act, a “tenant” is defined as “a person occupying land under a contract of tenancy.” Here Mooney was in occupation, and not Kelly. The letters show that the lettings were actual lettings of the lands, not merely agistment contracts.

Ronan, K.C., and *D. J. O'Brien*, for the respondent :—

Occupation means legal possession, and Kelly did not, by parting with the grazing rights for various periods of eleven months each, deprive himself of the occupation of the lands. See judgment of Cave, J., in *Mayor of Southport v. Ormskirk Union Assessment Committee* (3). Kelly paid the rent, rates, and taxes ; and he had his servant, the herd, on the lands, whose actual occupation was that of his master. These were agistment lettings and nothing more ; and successive lettings each for eleven months are inconsistent with actual lettings for a year. It is clear from the letters what was the intention of the parties, namely, that Mooney should acquire the grazing rights for a limited period in

(1) 2 Q. B. D. 581, at p. 588.

(2) [1897] 2 I. R. 39, at p. 50.

(3) [1893] 2 Q. B. 468, at p. 473 ; [1894] 1 Q. B. 196.

Appeal. consideration of a money payment, and that a legal tenancy
 1909. should not be created.

O'FLAHERTY,
Landlord;
 KELLY,
Tenant.

THE LORD CHANCELLOR:—

June 7. The question in this case is, whether Mr. Kelly is in occupation of the lands, the subject of the application—whether he has the status of an occupying tenant, so as to entitle him to apply to have a fair rent fixed.

The contention on the part of the appellant, the landlord, is that a man named Mooney, who had, every year since 1902, taken the grass from Kelly for eleven months, is the occupier, and that Kelly was out of the possession and occupation of the lands. Mr. Kelly, on the other hand, contends that Mooney has only a contract for agistment giving him a right in the nature of a *profit a prendre* to take the grass, but not conferring on him legal possession or occupation. Mr. Kelly's title accrued in 1889, and as he is a clerk in a public department in Dublin, he was unable to live on the lands, which are in the county of Galway. Accordingly he advertised them under the following poster:—"Grazing to let. To let. The grazing of about 58 acres of the lands of Largan, situate near Headford, County Galway, from 7th May, 1899, to 25th April, 1900." Up to 1902, when Mooney for the first time intervened as desiring to get the land, Mr. Kelly every year advertised them. The advertisements were headed—"To let for grazing," and they state "the lands will be let either as a whole to one or more persons, or in divisions to suit purchasers," and they also state "a herd resides" on the lands. On the 24th March, 1902, Mooney wrote asking if the farm was to be let, and, if so, "the price for it." Mr. Kelly replied, stating what he had been getting, and he added, "half the rent to be paid now, the balance next November." On the 30th October, 1902, Mooney sent him £55, described as "half a year's rent for the farm at Largan," and adds, "I would consider it a favour if you would let me know if you would be willing to take me as tenant for another year."

Kelly acknowledges this as "balance of grazing rent for the season," and adds, "I shall be glad to have you as a grazing tenant for the season, from 1st April, 1903, to 28th February, 1904."

Subsequently, naming a larger rent, Kelly wrote he would let him have the grazing from 1st April to 28th February, at £115. The letter of Kelly, 14th December, 1902, is of importance, where he wrote—"I agree to your terms. The herd is to have the same freedom as last year, and I am not to be responsible for any losses." This is plainly more referential to an agistment contract. In July, 1903, Mooney sent a bank draft, and asked him to have the land cleared of ferns and thistles. Kelly acknowledges it "as balance of Largan rent to 25th February," and asks about cost of the work, and he ultimately agreed to allow, and there was allowed, £2 10s. to Mooney for this.

This brings us to the season of 1904, during which the originating notice was served, and on the 4th February, 1904, Mooney writes, asking, "if you are inclined to let me have the Largan farm for another term." Kelly's reply of 6th February is—"You can have the grazing of Largan farm from 1st April to 25th February, 1905, for £115."

Mooney, in his reply of the 9th February, adopts these words—"The grazing of the Largan farm for another season"; and on the 11th February Kelly writes, "Willing to let you have the grazing." The notice was served on the 26th April, 1904. Mooney wrote for a renewal, and Kelly, while agreeing, imposed a condition to "sign an agreement," and to "remove his stock on 28th inst." These conditions, I have no doubt, had their origin in the originating notice. Mooney agreed, but asked for and got an extension of time for removing stock. The same dealing took place in later years.

Having regard to those letters, their language, the asking for renewals each year, and the adoption of the words "the grazing of the farm," the stipulations by Kelly that he was not to be responsible for losses, the paying for the removal of the ferns and thistles, the care and the removal of stock, is it possible to say that both parties did not believe the contract was an agistment one, or that the idea of a letting which would create a tenancy ever occurred to either? There are other elements, such as the payment of the rates by Kelly, and the payment of the grazing money in advance, which are all circumstances more consistent with an agistment contract. I think the whole question is, Was the contract an agistment one? and if it was, the clause in the

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Act of 1881 comes into operation, and deprives it of the character of sub-letting.

I quite agree that there may be a letting of land for eleven months, and occupation under that letting; but what we have first to determine is, what was the letting? Was it only an exclusive right to graze, the breach of which would only give a right of action for breach of contract; and it is well settled that under such a contract no right to the soil, or right to the possession, passes.

I cannot help thinking that eleven months' lettings of grazing are well understood in this country, and to give them the effect of tenancies requiring notice to quit would be contrary to what was intended by the parties, and nullify the object of such contract.

I do not think the case is solved by showing Mooney was always there, and that Kelly never was there. The question is to what relation the position is to be referred, whether agistor or tenant. I think it was to the former relation.

The appeal must be dismissed.

FITZ GIBBON, L.J. :—

When the crucial question is understood, there can be no doubt as to the real nature of the transaction between Kelly and Mooney; and it seems to me to determine the rights of the landlord and tenant. The terms of the documents and correspondence between Kelly and Mooney are capable of a construction and an interpretation which would evidence an actual letting of the lands, and the creation of a sub-tenancy. Every expression appropriate to the letting of land occurs, and not merely to a letting for a season, or for eleven months, but for the "year." But the real question is one of common understanding, or of mutual intention. I have no doubt whatever that the minds of the parties were *ad idem*, and that the one thing common to both was the knowledge that their dealing with the land was of that well-known class of which the primary or dominant object is to avoid the creation of any under-tenancy to which the Land Law Acts apply. If a sub-letting had been created, the object in view would have been defeated. Mooney was dealing with land as to which he was to have no right of occupation or possession, or even of user, whenever the period or term of each of these successive so-called "lettings"

came to an end. A "grazing letting" does not necessarily mean, and between Kelly and Mooney it did not mean, a letting of *land for grazing*; it meant the *hire of the grass* or "vesture" of the land. Such a hiring, in law, is an agistment contract, and nothing more. The possession and occupation of every estate and interest in the land remained wholly and entirely in Kelly, and the only contention capable of being argued for the appellant is that a man who is the tenant in possession and who has the only existing estate in occupation, in an agricultural or pastoral holding, must satisfy some further condition as to his method of using the land, and must physically use it in some special way, in order to have the *status* of a judicial tenant, or to have the right to fix a fair rent. Undoubtedly Kelly made no use of the land, except to make a money profit out of it by hiring out its produce to Mooney. Kelly was the actual successor in title of a judicial tenant, and the owner of a statutory tenancy at a fair rent. We should find ourselves in collision with the Act of Parliament, which draws the distinction between agistment contracts and sub-lettings, if we held that, when the object of both parties was to avoid any sub-letting, and where their dealing amounted only to a contract for the use of the vesture as distinguished from the occupation of the land, the statutory tenant divested himself of his *status* by doing something short of parting with the land itself.

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O'FLAHERTY,
Landlord;
KELLY,
Tenant.

Fitz Gibbon,
I.

HOLMES, L.J.:—

This is an appeal from an order made by Mr. Commissioner FitzGerald, on an application by Michael Kelly, to fix a fair rent of his holding for a second statutory term. A fair rent was first fixed by the Land Commission in March, 1889, Anne M'Hugh being then the tenant, upon whose death, shortly afterwards, Kelly became entitled to the tenancy. Mr. Kelly has since resided in Dublin; and has never made any personal use of the holding for agricultural or pastoral purposes. It consists entirely of pasture, partly good and partly rough; and except a herd's cottage, there seems to be now no building on the premises. The oral evidence of Kelly is to the effect that from the time he became entitled to the holding, he has used the land by letting it

Appeal. for grazing for eleven months every year ; and the question discussed before the Assistant Commissioners and Mr. Commissioner
1909.
 O'FLAHERTY, FitzGerald is, whether, in the circumstances of the case, he was
Landlord; occupying the land at the date of his application. The order
KELLY, appealed from, reversing that of the Sub-Commission, has
Tenant. answered this question in the affirmative, and directed a fair rent
 Holmes, L.J. to be fixed.

In considering the evidence, it is unnecessary to go further back than the year 1902, as whatever was the *status* of the persons who grazed the lands previous thereto, they then ceased to use them, and Kelly had possession and occupation until a fresh letting was made to a man named Michael Mooney, who has entered into a new agreement every year since. This has been done by correspondence ; and most of the letters are forthcoming. Each party relies on words and expressions contained therein in support of his case ; but it is evident that their language was not employed in a technical sense, and there is no difficulty in seeing that what was in the contemplation of both was a letting for agistment or temporary depasturage. Mooney recognized that each agreement only gave him a right to the grass for eleven months ; and although he did not in fact remove his cattle during March—the period excluded from the letting—he took care to have the terms of a new contract, often at a different rent, settled before that month. The herd was Kelly's servant, compensated for his services by his cottage and two acres of land ; and although Mooney was subject to little or no interference or supervision from year to year, his mode of user was that of persons who take lands for agistment only.

I am, therefore, satisfied that the contracts made with him cannot be deemed sub-lettings for the purposes of the Irish Land Acts. I think that this is not denied by the appellants' counsel ; but it is argued that, notwithstanding, Mooney has been in occupation of the holding. I am not prepared to hold that sub-tenancy is the sole test of occupation. There are cases in which a tenant, from friendship or some other cause, permits another to go into occupation of his holding for the benefit of the latter, without liability on his part to pay rent or to render an account. In such circumstances I would not hesitate to hold that the tenant, not

being in occupation, was not entitled to have a fair rent fixed; but a contract of agistment is a different thing. It was well known before the Irish Land Acts were thought of; and its legal characteristic is that it does not constitute a demise of the land or a parting with the possession thereof, but is a letting of a right in the nature of a *profit a prendre*, subject to which the occupation of the soil remains in the person who makes the letting. This probably led to the provision in the Land Law Acts that "agistment, or the letting of land for the purpose of temporary depasturage, shall not be deemed a sub-letting"; but whether it is to be thus accounted for or not, the legal *status* of the agistor is that of a person who is entitled to the grazing of land which is in the possession of another. For this reason, I am of opinion that the appeal must be dismissed, and the case remitted to the Sub-Commission to fix the rent of the holding for the second statutory term; but whether this will be of any ultimate advantage to the applicant is a matter as to which I have considerable doubt. He has for twenty years without oversight, trouble, or expenditure been receiving a handsome profit out of the holding, which Mr. Commissioner FitzGerald rightly says must be taken into consideration as an important circumstance, and if he can escape an increase of the rent fixed without this knowledge in 1889, he ought to think himself very lucky.

Solicitor for the landlord: *H. Concannon.*

Solicitor for the tenant: *Herbert Malley.*

Appeal.
1909.

O'FLAHEERTY,
Landlord;
KELLY,
Tenant.

Holmes, L.J.

R. ST. J. C.

Wylie, J. IN THE MATTER OF THE ESTATE OF R. S. R. FETHER-
1909. STONHAUGH.

May 4.

*Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48 (3)—
Agreement for purchase entered into—Date of—Sale under section 6—
Waiver of formal proposal and acceptance.*

With a view to instituting proceedings for sale of certain lands, under the provisions of section 6 of the Irish Land Act, 1903, at the request of the vendor, the Estates Commissioners, on the 11th November, 1907, furnished an estimate of price, stating that it was not to be taken as an offer to purchase, and adding that if within a certain time the vendor intimated that he was willing to proceed with the sale, and took the necessary steps to initiate proceedings for sale pursuant to the provisions of the Act, the Commissioners would take such other steps as might be necessary before a formal offer to purchase could be made, and further adding that the vendor should continue his arrangements for the user of the lands until a formal proposal from the Commissioners to purchase was received by him.

After further discussion by letter, on the assumption that a bonus of 12 per cent. would be payable, the vendor, on the 8th February, 1908, agreed to accept the price named. Everything required to be done by the letter of the 11th November, 1907, was done prior to the 21st November, 1908, except the signing of a formal agreement, and the furnishing of proof of *prima facie* title. On the 21st November, 1908, as the vendor was pressing the Commissioners to complete the sale, the Commissioners' surveyors entered on the lands, and lockspitted them with a view to distribution:—

Held, that the Commissioners by their acts had waived the formal proposal and acceptance contemplated by their letter of the 11th November, 1907, and had ratified the contract already agreed to by the vendor prior to the crucial date (1).

QUESTION OF LAW submitted by the Estates Commissioners for the decision of the Judicial Commissioner, under section 23, sub-section 1, of the Irish Land Act, 1903.

The facts as appearing in the amended memorandum of the Estates Commissioners were as follows:—

(1) *Note*.—The Treasury minute reducing the bonus from 12 per cent. to 3 per cent. was published on the 24th November, 1908.

The lands, the subject-matter of the proceedings for sale in this matter, were untenanted lands situated at Battstown, Dryderstown, and Killulagh, County Westmeath.

On the 14th June, 1907, the vendor, by his solicitor, wrote to the Estates Commissioners as follows:—"Herein I enclose you ordnance map and certificate of valuation of certain untenanted lands in the occupation of the above owner, which, on his receiving a satisfactory and adequate price, he would be prepared to sell to the Estates Commissioners, and he is desirous that an Inspector should visit the property, and furnish him with an estimate of the price which they would be prepared to give; notice of the day of inspection being given to me."

On receipt of the foregoing letter, the Estates Commissioners, on the 11th November, 1907, after inspecting the lands for sale, wrote to the vendor as follows, by their Secretary:—"I am directed by the Estates Commissioners to inform you that they have had the lands in the schedule and map inspected, and that they estimate the price of same at £13,364, which is exclusive of such bonus as may be payable according to law. This estimate is furnished solely for the vendor's information and is not to be taken as an offer to purchase the lands. If, within fourteen days from this date, the vendor intimates by letter that he is prepared to proceed with the sale of the lands set out in schedule at the price mentioned, and forthwith institutes proceedings by lodgment of an originating request, accompanied by the maps and schedules prescribed by the Rules, for the sale of an estate comprising the above-mentioned lands and any other tenanted or untenanted lands on the same estate, the Commissioners will direct such further inspection as may be required, will make inquiries as to suitable purchasers for the lands, and take such other steps as may be necessary before a formal offer for the purchase of the lands, in accordance with the provisions of the Irish Land Act, 1903, can be made. As the proceedings in connexion with the proof of *prima facie* title to sell, and the steps to be taken by the Commissioners to ascertain if a resale of the lands can be effected, will necessarily occupy a considerable time, it is desirable that the vendor should continue his arrangements for the user of the lands until *prima facie* title has been shown, and a formal proposal from

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ESTATE.

Wylie, J. the Commissioners to purchase is received by him, when arrangements can be made as to the date on which clear possession of the lands is to be given to them.”

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After some further discussion by letters, from which it appeared that the owner's average net annual income from the lands had been £578, and that the estimated price and bonus thereon, calculated at 12 per cent., if invested at $3\frac{1}{2}$ per cent., would yield only about £524, on the 5th February, 1908, the Estates Commissioners, by their Secretary, wrote that the estimated price of £13,364 was for the lands in fee-simple, discharged from all superior interests. On the 8th February, 1908, the vendor, by his solicitor, wrote to the Estates Commissioners as follows:—“While expressing his disappointment that the Commissioners cannot see their way to advance on their offer of £13,364, and bonus, I am instructed by General Fetherstonhaugh to state that he will accept the offer, and that the originating request, &c., will be presently lodged.”

On the 12th March, 1908, the vendor lodged the originating request.

As the vendor was urging the Estates Commissioners to complete the sale, the Commissioners' surveyors on the 21st November, 1908, and the following days, entered on the lands, and lockspitted them so as to enable the Commissioners to carry out, with as little delay as possible, the scheme for the distribution of the said lands which had been approved of by them. On the 15th January, 1909, when the vendor had satisfied the Commissioners that he was a person having power to sell the said lands under the Land Purchase Acts, a formal offer to purchase the said lands was issued by the Estates Commissioners to the vendor. The vendor had refused to accept this proposal, unless he could be assured that he would be entitled to the percentage payable under section 48 of the Irish Land Act, 1903, and under section 1 of the Irish Land Act, 1904, at the rate of 12 per cent.

The Estates Commissioners had declared the said lands fit to be regarded as a “separate estate”; but if the percentage at 12 per cent. would not be payable, the Estates Commissioners would be unable to acquire the lands. The Estates Commissioners referred the following question of law for the decision of the Judicial Com-

missioner :—Whether under the above circumstances, if the vendor accepted the said proposal of the Estates Commissioners to purchase the said estate, and the conditions of the said proposal were subsequently fulfilled, and the estate vested in the Estates Commissioners, would the vendor be entitled to the percentage above referred to, calculated at 12 per cent. ?

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Ronan, K.C., and S. L. Brown, K.C., for the owner :—

This is not an ordinary case of sale between vendor and purchaser. The Land Commission is in a position analogous to that of the Court administering funds entrusted to its care, and must act in accordance with the principles laid down by Farwell, L.J. : *In re Tyler* (1). Those principles may be summarized as follows : That where the Court is in the position of a quasi-litigant; and enters into a contract or relationship in which rights, legal, equitable, or moral, arise, if, by its course of conduct, the position of the parties has been affected in the interpretation of their rights, the Court will not be confined to the strict legal interpretation, but will apply the test of, What would an honest man do under the circumstances ?

In *Rowe v. Gough* (2) Lord Macnaghten says, "The Court is bound to keep faith with its purchasers." Here the negotiations have been carried out on the basis of a 12 per cent. bonus.

The Estates Commissioners, by entering on the lands and lockspitting them, have waived their right to a formal proposal and acceptance, and have ratified the contract already agreed to by the vendor.

Serjeant O'Connor, K.C., for the Treasury :—

There is no evidence of waiver of the express conditions contained in the original letter of the Estates Commissioners, that the estimate therein contained was not to be taken as an offer to purchase the lands. Before you can rely on part performance you must get a contract. Neither the Estates Commissioners nor the owner considered that a binding offer had been made prior to the 15th January, 1909.

(1) [1907] 1 K. B. at p. 871.

(2) *Ante*, at p. 104.

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I have no doubt as to what I should decide in this matter. It seems to me, taking the letter of November 11th, 1907, with the letters of the 5th and 8th February, 1908, that there were the complete terms of a contract arranged, if the parties intended to enter into a contract. Everything required to be done by the letter of 11th November, 1907, had been done prior to the 21st November, 1908, except the signing of a formal agreement, and proof of *prima facie* title.

The amended memorandum of the Estates Commissioners states that the vendor was urging them to complete the sale—that is, the sale of the lands in fee-simple, free from all superior interests and incumbrances, as described in their letter of 5th February, 1908, at the price estimated by the Estates Commissioners, which terms, in the letter of 8th February, 1908, the vendor expressly agreed to accept, and accordingly lodged an originating request as required by said letter of the 11th November, 1907. The memorandum states that “as the vendor was urging the Estates Commissioners to complete the sale, the Commissioners’ surveyors, on the 21st November, 1908, and following days, entered on the lands and lockspitted them, so as to enable the Commissioners to carry out, with as little delay as possible, the scheme for the distribution of the said lands, which had been approved of by them.” Therefore, in the interval that elapsed between the 8th February or the 12th March, when the originating request was lodged, and the crucial date, *i.e.*, the 24th November, 1908, the Estates Commissioners had sent inspectors on the lands, settled the entire scheme for distribution of same, and, without any formal offer and acceptance, lockspitted and divided the lands into parcels.

In my opinion, the Estates Commissioners by their acts entirely waived the formal proposal and acceptance contemplated by the said letter of the 11th November, ratified the contract already agreed to by the vendor, and they ought to carry out their contract, either by having a formal agreement signed, or by vesting the lands without any further agreement.

The vendor should not have any difficulty in signing the formal

agreement proposed by the Estates Commissioners, as I will declare him entitled to the bonus at 12 per cent.

I answer the question submitted to me in the affirmative.

I will give a direction to the Examiner that the bonus at 12 per cent. may be vouched without any further question.

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Solicitor for the owner: *E. E. Mason.*

Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

O'NEILL v. JOHNSTON (1).

Appeal.
1908.

*Several fishery—Navigable non-tidal lake—Public user—Prescription—
Evidence—Injunction—Practice—Liberty to apply.*

June 17-20.
Nov. 30.

The Crown is not, of common right, entitled to the soil or waters of an inland non-tidal lake, nor can any right exist in the public to fish in the waters of such a lake. A claim was made for a several eel-fishery, extending over the whole of Lough Neagh, a large, navigable, non-tidal lake in Ireland. The claim was founded on a grant by Charles 2, dated 1661, and upon certain leases since made by persons claiming under the grant, and payment of rent under grant and leases were shown. The title of the Crown was established to the satisfaction of the Court by certain inquiries had prior to the grant. As evidence of user under the grant it was proved that the Bann eel-fisheries, which were held by the same title as the Lough fisheries, were strictly preserved. There was no evidence of acts of ownership in respect of the eel-fishing in the Lough, but the grantees exercised their rights over river and Lough by means of weirs in the river, which was the ancient and recognized method of eel-fishing. The evidence showed that only in a small portion of the Lough had the fishing been protected, and convictions for trespass been obtained. On behalf of the defendants, who were fishermen, evidence was given of continuous fishing by the public from time immemorial:—

Held, by the Court of Appeal, affirming the judgment of ROSS, J., that the plaintiffs' documentary title to a several fishery in the whole of the Lough being in point of law coercive, and their user under this title being the only reasonable and profitable user, the plaintiffs' title was not displaced by the evidence of long-continued fishing by the public.

There was no evidence of any damage having been done to the plaintiffs'

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

Appeal. several fishery, save by the defendants fishing with draft-nets in Toome Bay, a small portion of Lough Neagh, situate at the north-western corner, where
 1908. a small portion of Lough Neagh, situate at the north-western corner, where
 O'NEILL the waters of the Lough discharge themselves into the Lower Bann River :—
 v. *Held*, also, by the Lord Chancellor (Lords Justices FitzGibbon and Holmes
 JOHNSTON. concurring with hesitation), that the injunction against the defendants should
 be restricted to Toome Bay, with liberty to the plaintiffs to apply in respect of
 any further injury to their several fishery; the concurrence of FitzGibbon, L.J.,
 in the injunction so limited being based upon the assumption that, under the
 liberty to apply, the plaintiffs would be sufficiently protected against any
 further substantial damage.

APPEAL by the defendants from the judgment of Ross, J., and cross-appeal by the plaintiffs from the judgment, so far as it limited the injunction to Toome Bay. The case before Ross, J., is reported [1908] 1 I. R. 358, where the facts and the documentary title of the plaintiffs are fully stated. These will also be found recapitulated in the judgment delivered by Holmes, L.J., *infra*.

Gordon, K.C., Healy, K.C., and Kerr, for the defendants.

Ronan, K.C., Jellett, K.C., and Gaussen, for the plaintiffs.

The arguments of counsel on the appeals did not materially differ from those already reported, and are so fully referred to in the judgments that it is unnecessary to repeat them here.

Nov. 30.

HOLMES, L.J. :—

This is an appeal from a judgment of Ross, J., the effect of which is to declare the plaintiffs entitled to the exclusive right of fishing for eels, and to all eel-fishings and eel-weirs in Lough Neagh, for the residue of a term of 5000 years, demised by a lease of the 18th July, 1905, and to award a perpetual injunction restraining the defendants from fishing for or taking eels, or from interfering with the plaintiffs' eel-fisheries in the portion of Lough Neagh known as Toome Bay.

Lough Neagh is an inland lake, the area of which exceeds one hundred and fifty square miles. It is navigable; and steamers, as well as other vessels carrying passengers and merchandise, use it as a highway from place to place on its shores. It abounds in fish, and

receives the waters of several rivers; but it has only one important effluent—the Lower Bann—which flows from the north-western corner of the Lough, known as Toome Bay, and reaches the sea near Coleraine. Although the controversy in this action is confined to eel-fishing in the Lough itself, the lease of the 18th July, 1905, referred to in the judgment appealed from, includes in the demise thereby made the eel-fishery within the River Bann, near Toome Bridge, with all the weirs, dams, and other appurtenances, belonging to or usually enjoyed therewith. This has been for at least eighty years—and probably for centuries before—a fishery of great value; and it may be assumed that the right of the plaintiffs thereto cannot now be challenged. If good title to any property can be shown by documents, user, and legal decision, the right to this fishery of the persons through whom the plaintiffs claim has been long since established. As pointed out by Mr. Justice Ross, their title has been found by the verdict of a jury, supported by the decision of a Divisional Court, and subsequently upheld by two decisions of the Vice-Chancellor, one of which was affirmed on appeal. In these circumstances, I am bound to hold that the plaintiffs' right to all eel-fishings in the River Bann is no longer in dispute; and it is certainly not a subject of controversy in the present action. Still it has an important bearing on the issue now before the Court, inasmuch as the plaintiffs' root of title to the Bann eel-fisheries is the same document on which they rely as constituting their root of title to the eel-fishings of the Lough. I refer to the Letters Patent of the 3rd July, 1661, by which, after certain recitals, King Charles 2 granted to Arthur, Earl of Donegall, his heirs and assigns, all the fishings and fishing-places of what kind soever in the lough or pool of Lough Neagh and Toome, and in the river of the Bann from the aforesaid lough or pool to the rock or fall of water called the Salmon Leap in the River Bann, together with the eel-weirs in the said river. It cannot be denied that such fisheries and rights of fishing in Lough Neagh and the River Bann as were conferred by this Patent on Arthur, Earl of Donegall, were, at the date of the lease of 1905, vested in the Earl of Shaftesbury, the lessor therein. Documents have been given in evidence showing with singular completeness the chain of title; and, there-

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Appeal. fore, the first, the cardinal, and, indeed, I would say the only,
 1908. question to be considered is, whether Charles 2 was himself
 O'NEILL — seised in fee of the fisheries and fishings in Lough Neagh,
 v. which, in 1661, he purported to grant to Lord Donegall. The
 JOHNSTON. grounds on which I am prepared to so hold is that whatever
 Holmes, L.J. may be the rights of the plaintiffs, the defendants can have no
 legal title to fish or capture eels in Lough Neagh. Their only
 claim to do so is as members of the public; and this claim is
 based on the allegation to be found in paragraph 7 of their
 defence, "that Lough Neagh is, and from time immemorial has
 been, a public and common and navigable inland sea, and every
 subject of the realm has, and of right ought to have, the right and
 privilege of fishing in and on the same Lough." A defence, in the
 same words, was pleaded in *Bristow v. Cormican* (1), a case to which
 I shall presently refer in more detail, but which it is now enough
 to say was an action for trespass to a several fishery in a portion of
 Lough Neagh called Feumore. To this defence there was a repli-
 cation averring that the tides of the sea had never flowed in Lough
 Neagh. To this replication there was a demurrer which was
 overruled, and, although the case was afterwards heard by the House
 of Lords on another point, the order overruling the demurrer was
 not questioned. Palles, C.B., in giving judgment on this demurrer,
 says :—"The question thus raised is, whether the meaning of the
 word 'navigable,' in the sense in which it is used in defining the
 waters in which the public have *prima facie* a common of fishing is
 synonymous with 'tidal.' If it were now open to consider that question
 unfettered by authority, I should deem it one which would require
 grave consideration." But, as the learned Chief Baron went on to
 show, this very question was decided in *Bloomfield v. Johnston* (2),
 so far back as the year 1862, by the Court of Exchequer Chamber
 in this country; and he rightly regarded that decision as a conclu-
 sive authority in his Court. It is also an authority which the Irish
 Court of Appeal ought to follow, unless it has been overruled or
 seriously shaken by subsequent decisions; but no such decisions
 are to be found in our Law Reports. On the contrary, the defence
 disposed of by the demurrer in *Bristow v. Cormican* (1) has not, as

(1) I. R. 10 C. L. 398.

(2) I. R. 8 C. L. 68.

far as I am aware, been since relied on; and although the House of Lords, in giving judgment in that action, carefully avoided expressing an opinion on a matter that was not the subject of appeal, its decision that the Crown had no *de jure* right to the soil or fisheries of an inland navigable lake, seems at least to suggest that there can be no public right of fishing therein. This proposition laid down by all the peers distinguishes, as far as *prima facie* ownership of the soil and fisheries is concerned, Lough Neagh from the tidal waters of a river, and places it in the same position as the portion of a river that is non-tidal, in which it is well settled that there can be no public right to fish. It is, I think, not unreasonable to apply the same rule to the waters of Lough Neagh. But, whatever view may be taken hereafter of this question by the House of Lords, it is for the present settled in all Irish Courts. Indeed, no attempt has been made in the arguments addressed to us to support the defence to which I have called attention, nor did counsel for the appellants even mention *Bloomfield v. Johnston* (1), or the demurrer in *Bristow v. Cormican* (2); and I gather that the same course was followed in the Divisional Court, for I find Ross, J., beginning his judgment by stating two propositions of law as if they had been accepted by both parties without doubt or discussion. "The first," he says, "is that the Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. The second is, that no right can exist in the public to fish in the waters of an inland non-tidal lake."

Although some other subjects have been touched on by counsel for the appellants, their real defence is that the Court ought not to find on the evidence that the fishings in Lough Neagh were vested in the Crown at the date of the Patent of the 3rd July, 1661. This is a question of fact, as to which, apart from evidence, there is no presumption one way or other; but the onus of proof rests upon the plaintiffs. It has been suggested rather than seriously argued that, even if the Patent of 1661 vested the fishings of the Lough in the Earl of Donegall, he or his successors in title may have afterwards abandoned their rights or transferred them to some

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(1) I. R. 8 C. L. 68.

(2) I. R. 10 C. L. 398.

Appeal. person now unknown. No weight can be attached to these conten-
 1908. tions. The law does not recognize the abandonment of an
O'NEILL incorporeal hereditament such as a several fishery ; and to call into
v. existence an imaginary transferee would be to decide a question
JOHNSTON. of fact by the invention of a manifest fiction.
Holmes, L.J.

Coming, then, to the real point to be determined, I think the best introduction to it will be a brief consideration of what occurred in *Bristow v. Cormican* (1). That, as I have already said, was an action for trespass on a several fishery in Lough Neagh at a place called Feumore ; and the plaintiffs' evidence began with a lease of the year 1660, from King Charles 2 to Sir John Clotworthy, demising all the Lough called Lough Neagh, and Toome, together with the fisheries and the soil thereof and certain islands ; and also the lough and river of Bann as far as the Salmon Leap, containing six salmon-fishings and two mixed fishings of salmon and eels, and one of eels and another of trout. The lease was for a term of ninety-nine years from May, 1656, at a rent for the Lough and its soil with the fishings for the first seven years of £5 a year ; and for the river Bann with the fishings during the same period of £35 a year, and afterwards at a larger rent during the continuance of the term. The document next in order of date proved in that action was the Patent of the 3rd July, 1661, to which I have already referred, and in which the lease of the previous year is recited, and the grant is made subject thereto. No document prior to these instruments was given in evidence ; and although both the Patent and also, I believe, the lease contained recitals of a former grant by King James to Lord Chichester, and of its surrender to Charles 1, Lord Blackburn says in reference thereto that these recitals are no evidence of what is recited. He therefore held that there was no evidence that there ever had been any grant by King James to Lord Chichester or any surrender to Charles 1. The Patent of 1661, being in that case as in this the root of title, the subsequent documents relied on were a lease of the 1st November, 1811, from the then Marquis of Donegall to Sir George Hill of the salmon, trout, and scale fishings of Lough Neagh and of the river Bann as far as the Salmon Leap, for the

(1) 1. R. 10 C. L. 398.

purpose of taking salmon and other fish, except eels, as late in the tenure of the Rev. Edward May by virtue of a lease of 1803 (not produced) which had been surrendered. The term of the demise to Sir George Hill was sixty-one years, and the annual rent £60. The next instrument was a lease of the 31st March, 1829, for lives renewable for ever given in consideration of a fine of £600 by the same Marquis of Donegall to John Wallace of the same fishings and by the same description as in the lease of 1811, and subject to that lease; the rent thereby reserved was £55 7s. 6d., sterling, the equivalent to £60 Irish currency. This lease was in 1857 converted into a fee-farm grant, the grantee being Nicholas Crommelin, on whom Wallace's interest had devolved; and the plaintiffs in the action of *Bristow v. Cormican* (1) were his trustees, who brought their action after the term demised to Sir George Hill had expired. The foregoing, with a sub-lease made in 1837 to Lord O'Neill by the assignees of Sir George Hill, include, I think, all the documentary evidence in *Bristow v. Cormican* (1); and I have stated its purport for the purpose of showing how far it falls short of what has been proved in the present case. Of course evidence was also given of payment of the rents reserved by the lease of 1811 and the sub-lease of 1837; and there was some parol evidence of possession by persons claiming from Lord O'Neill, the purport of which is stated by Palles, C.B. (2). I gather that in his opinion the effect of this evidence was to show possession by the sub-lessee of the fishings between Antrim and Toome, but that Feumore, where the defendants fished, was many miles distant therefrom, and that many witnesses deposed to the public having fished continually, and at their own will and pleasure, at Feumore, and in the entire of Lough Neagh except in the portion between Antrim and Toome. In these circumstances the plaintiffs' counsel asked for a direction upon the issue involving plaintiffs' title to the *locus in quo*, to which requisition Lawson, J., acceded, declining to leave to the jury the question whether the plaintiffs had a several or exclusive ownership in the part of the Lough fished by the defendants. The only question considered by the House of Lords was, whether this ought to have been left to the jury; and it was

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(1) I. R. 10 C. L. 398.

(2) *Ibid.* pp. 405, 406.

Appeal. held that this was a question of fact to be found by the proper
 1908. tribunal for dealing with such issues. The House of Lords,
O'NEILL following the Court of Exchequer, were satisfied that there was
v. evidence to support the plaintiffs' claim proper to be submitted to
JOHNSTON. the jury; and I gather that a verdict for either the plaintiffs or
Holmes, L.J. the defendants could not have been set aside; but as there ought
 not to have been a direction by the Judge, a new trial was ordered.
 No subsequent step seems to have been taken by either party; and
 therefore the only assistance that can be derived from this case is
 that it is our duty, as it was the duty of Mr. Justice Ross, to weigh
 the evidence; and, having regard to it, to answer the question which
 ought to have been left to a jury if that mode of trial had been
 adopted. In former times such a controversy as has here arisen
 would probably have been settled by the verdict of a jury; but
 such an action as the present is heard by the Court unless an order
 is made directing the issue to be otherwise dealt with; and in this
 case no such order was applied for.

I now proceed to consider, in the words of Lord Cairns, "What evidence is there of acts done—acts as it were *in pais*, either before or at any time since 1660, which would be admissible as evidence of the title of the Crown at that date?" The plaintiffs have evidently acted on Lord Blackburn's hint that, although recitals in old documents are no evidence of what is recited, they may put the parties on the track as to where to look for evidence of the truth; and the result has been that ten instruments having an important bearing on the issue, and all prior to 1660, are included in the proofs given at the hearing in the Divisional Court.

Mr. Justice Ross has stated their contents so carefully, and in such detail, as to relieve me from the necessity of dealing with them at any length. They are—(1) a commission for holding an inquisition in Antrim, and (2) the inquisition taken pursuant thereto of the 12th July, 1605, by which it was found that Queen Elizabeth had been in her lifetime seised in fee of all manner of fisheries, as well of salmon as of eels and other fish, in a moiety of Lough Neagh, and of certain eel weirs in the river Bann, and a certain free fishery of eels, salmon, and other fish therein, and that at the time of the inquisition King James, as her heir, was possessed of the premises; (3) Letters Patent of the 14th February

following, by which King James granted to James Hamilton, in fee, the entire fishing of every kind in Lough Neagh and the river Bann, as far as the Salmon Leap, with certain old weirs for taking eels near Castle Toome; (4) extract from the Crown Rental for county Antrim of 1619, showing that Arthur, Lord Chichester, assignee of James Hamilton, then held the entire fishery in Lough Neagh and the river Bann at 12*s.* 6*d.* per annum; (5) an inquisition taken in Carrickfergus on the 6th April, 1621, consequent on (6) a commission to the Bishop of Dromore and others, reciting the Letters Patent to James Hamilton of 14th February, 1605, and finding that King James was seised in fee at the time of making the grant of the entire fishing of every kind in the pool of Lough Neagh, and the Bann as far as the Salmon Leap, as well as the bottom soils of the lough and river, and further finding that James Hamilton, by charter of feoffment of the 10th April, 1606, for good and valuable consideration granted all the premises to Arthur, Lord Chichester, and his heirs; (7) Letters Patent of the 20th November, 1621, by which King James 1 granted to Arthur, Lord Chichester, and his heirs, all the fishings in both the lough and river, and the soils thereof; (8) A commission of King Charles 1 of the 21st October, 1639, to take a surrender from Edward, Lord Chichester, and Arthur his son, of all the fishings and soils aforesaid; (9) a surrender of the 1st July, 1640, in pursuance of an order of composition and agreement of the 19th September, 1639, by Edward, Lord Chichester, and his son Arthur to the King, of all the fishings and soil in both lough and river; and finally (10) the indenture of lease dated the 14th August, 1656, from the Protector to Sir John Clotworthy, which is recited in the lease of King Charles 2 given in evidence in *Bristol v. Cormican* (1). There are lands and fisheries in England and in some parts of Ireland the muniments of title for which go much farther back than the reign of Queen Elizabeth; but there are few, if any, such estates to be found in Ulster. Before her time, English government and English law had hardly penetrated to the northern province, a striking account of the condition of which under the Tudors is to be found

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Appeal. in the statute (11 Elizabeth, session 3, chapter 1) which declared
 1908. the attainder of Shane O'Neill and the title of the Queen to the
 O'NEILL county of Tyrone and to other extensive counties and territories,
 v. some of which it would be now difficult to identify. The inquisi-
 JOHNSTON. tion of 1605 recites a grant of the 16th November, 1571, from the
 Holmes, L.J. Queen to Sir Thomas Smith and his son on the condition, which
 was not fulfilled, that they would be able to obtain possession of
 the granted premises against the Irish before the 28th March,
 1579. This grant was made about two years after the statute
 referred to, and I have little doubt that the fisheries therein
 mentioned formed part of the hereditaments which were declared
 by that Act to be held, possessed, and enjoyed by the Queen in
 right of her Crown. Having some experience of Ulster titles, I
 have been surprised to find that of King Charles 2 to the fisheries
 of Lough Neagh and the Bann at the date of the Patent of 1661
 so satisfactorily supported by earlier instruments. It is true that
 the inquisition of 1605 finds title to fishings in only part of the
 Lough; while the Letters Patent to Hamilton that follow grant the
 entire fishing. I cannot account for this; but there is no doubt
 as to the finding in the inquisition of 1621, and the Patent that
 followed confirmed to Arthur, Lord Chichester, all that had been
 granted to him by Hamilton. If there was no title to, or posses-
 sion of, these fisheries, it is difficult to understand the elaborate
 steps taken for their surrender to King Charles 1, the difficulty as
 to which, pointed out by Lord Hatherley in *Bristow v. Cormican* (1),
 has been got rid of by the production of these documents, which
 show that while the surrender is dated the 1st July, 1640, it was
 made pursuant to an order and agreement of the previous Sep-
 tember. Lords Hatherley and Blackburn thought that the value
 of the evidence afforded by the lease to Sir John Clotworthy
 was diminished by the fact that he had been compelled by
 Cromwell to accept this lease in lieu of a pension for his life
 given by James 1. I can find no reason for believing that there
 was any such compulsion. Clotworthy is often mentioned in
 the history of the time. He seems to have been trusted by the
 Protector, who, two years before the lease of 1656, appointed him

on a committee to determine differences among the adventurers for Irish lands; and I should think the demise was of greater value than the pension. Immediately after the Restoration he was sent to London to represent the interests of the Irish adventurers and the soldiers settled in Ireland; and although his previous career was far from friendly to the House of Stuart, I gather from Clarendon that he was well received at Court. At all events, according to the historian Carte, he obtained good terms for his clients and did still better for himself. The King, who created him Lord Massereene within a year, would doubtless gladly have restored his pension; but he was wise enough to prefer the confirmation of the Protector's lease, the rent reserved by which was duly paid to the Crown up to Michaelmas, 1660. This appears from the extracts from the Crown rental and Crown Rent Receipt Book which are in evidence, and there is no reason to doubt that after the reversion was in the following year vested in the Earl of Donegall, the rent was paid and possession enjoyed under the lease until the term expired in 1755. In 1692 the Donegall estates were re-settled by the third Earl of Donegall. There was a further re-settlement in 1718; and I understand that in the recoveries and other instruments by which these settlements were carried out, all the fishings granted by the Letters Patent of 1661 were included. We thus find a clear documentary title to the Lough and river fishings for 150 years; and while there is much to show that during that period possession and enjoyment of so much of the fishing as was of any value were in accordance therewith, there is nothing to suggest the contrary. The weight of the evidence as to possession of, and acts of ownership over, any property, depends upon the character and situation of the property itself. The waters of the Bann as far as the Salmon Leap, like the waters of Lough Neagh, were non-tidal; and if the King in 1605 or 1621 or 1661 was entitled to grant the fishings in the former, there was nothing improbable in his being also entitled to grant the fishings in the latter; but these fishings differed widely from each other in their nature. The rents reserved in Clotworthy's lease suggest that at its date the river fishery was at least seven times more valuable than the other; and I have no doubt that a similar inequality has always existed. The great

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Appeal. element of value in the fisheries, taken as a whole, was the eel-
 1908. weirs in the Bann, which were in use from the earliest times of
 O'NEILL which we have any record. The habits of eels are peculiar.
 v.
 JOHNSTON. Having ascended from the sea to such a lake as Lough Neagh in
 spring, small and apparently worthless, they grow very rapidly
 Holmes, L.J. and go back to the sea in autumn or early winter. They select
 for their return dark and stormy nights on which, collecting in
 large quantities, they begin a descent which is abruptly terminated
 by such weirs as are found at Toome, in the Lower Bann, or at
 Belleek in the River Erne. It often happens that in two or three
 nights as many eels are captured in the weirs as, when transferred
 to artificial ponds in which they are temporarily preserved, will
 supply large markets for several months. It will thus be seen
 that the real fishery of eels is in the Bann, to which Lough Neagh
 is a mere adjunct where the eels accumulate, but in which they
 could not be fished with any commercial profit. Bearing this in
 mind, I have next to see what became of the eel-fishings—the only
 subject-matter of the present action—after the expiration of
 Clotworthy's lease. The Donegall rentals show payments of large
 rents for the Bann fisheries, from 1775 to 1816; but I prefer to
 come to specific demises of which there is no doubt. There is a
 lease from the Marquis of Donegall to Samuel Fynaston, dated
 the 3rd November, 1795, of the eel-fishery near Toome for thirty-
 one years. After this term had expired, Lord Donegall, in con-
 sideration of £7384 12s. 5d. and of an annual rent of £369 4s. 7d.,
 demised to Earl O'Neill the eel-fishings in the Bann River near
 Toome Bridge, reserving all salmon, trout, and other such fish, for
 a term of 5000 years. On the death of Earl O'Neill this lease
 vested in his brother, Viscount O'Neill, who, on the 28th Sep-
 tember, 1850, in consideration of £1625, assigned his interest to
 the Commissioners of Public Works, who, on the 25th June, 1855,
 assigned for £2800 the premises to John O'Neill, who is now
 represented by Edward A. O'Neill, one of the plaintiffs, who
 made several sub-leases of the fishery; and at length the lease of
 1827 was surrendered, and the new lease of the 18th July, 1905,
 given in substitution therefor, for a term of 5000 years, at the
 yearly rent of £884 4s. 7d. This lease includes the eel-fishing in
 Lough Neagh, as well as the eel-fishings in the Bann demised by

the surrendered lease; and the plaintiffs represent the lessees therein, as well as two sub-lessees who hold all the fishing rights under a lease dated 20th October, 1905, at an annual rent of £2550.

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All the foregoing instruments subsequent to Clotworthy's lease, down to the lease of 1905, deal only with the eel fishery in the Bann, near Toome Bridge; and during this period the eels in the Lough are not included in any deed. The manifest reason of this is that the only eel-fishery of value was that carried out by means of the weirs. I accept the evidence that there was line-fishing for eels in Toome Bay and in other parts of the Lough; nor is there any doubt that they were sometimes caught in draft pollen nets; but the number so taken was infinitesimal compared with the quantities captured in the river by the weirs. The amounts of the fines and rents paid by the lessees and sub-lessees of these weirs are powerful evidence that the eels taken in the Lough did not appreciably diminish the supply; and I am of opinion that no inference can be drawn therefrom as against the title shown by the documentary evidence, and by the only kind of possession to which importance can be attached. Attempts were made from time to time to interfere with such possession, and it was these attempts that led to the litigation beginning in 1864, and renewed at intervals down to 1897. Ross, J., has fully stated the details of this litigation, which, as I have already said, has established the plaintiffs' title to the eel-fishery in the Bann. It would, doubtless, have been a strong circumstance against the right to fish in Lough Neagh under the Patent of Charles 2, if Clotworthy's lease was the last demise of the fisheries therein. But the scale-fishings of the Lough have been let and sub-let for over a hundred years, at rents which have been duly paid, and in return for which there has been presumably some enjoyment. I have already referred to a few of the instruments by which these lettings were effected when commenting on *Bristow v. Cormican* (1), and further documents of the same kind have been produced in the Divisional Court. As the action has been confined to eel-fishing, and as the plaintiffs neither claim nor can claim anything more, the evidence

(1) I. R. 10 C. L. 398.

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on both sides as to user relates chiefly thereto, but I cannot overlook what is not denied, that members of the public have continuously and systematically fished without controversy in every part of the Lough for a kind of fresh-water herring called pollen. Statutes of the Irish Parliament have recognized the existence of such fishing in Lough Neagh as well as in Lough Erne, and probably in other lakes. This can be accounted for by the fact that owners of property, through kindness or carelessness, often permit acts of trespass which, while benefiting their poorer neighbours, inflict no injury on themselves. Neither the Lords Donegall, nor their lessees nor sub-lessees, could have carried on pollen-fishing as a successful commercial enterprise. The cost of providing nets, boats, and crews, would leave no margin of profit. It would, moreover, have been practically impossible to have protected from trespassers such a large expanse of water. These considerations, in addition to the unpopularity which any interference with old usage would be certain to excite, explain the pollen-fishing. I can also understand that, for similar reasons, no further step was taken in *Bristow v. Cormican*, after a new trial had been ordered by the House of Lords (1). The fishing in that Lough for salmon and trout could only be made valuable in such portions of the water as could be watched and preserved with much difficulty; and if such portions were little interfered with, the plaintiffs were, doubtless, prudent in leaving the action a drawn battle.

I do not think it necessary to refer to all the topics touched on by counsel for the appellants. I have confined myself to those to which I attach importance. The result is that I am of opinion that the appeal must be dismissed, and I sum up in a few words my reasons for this conclusion. Holding, as I am bound to do in an Irish Court, that there is no public right of fishing in Lough Neagh, it follows that there must be some owner of the right to fish therein. Whoever that owner is, he has, as long as memory goes back, permitted pollen-fishing in all the Lough, and the taking of other fish in a large part of it; and if he be not a person claiming through the Patent of Charles 2, there is absolutely no evidence of his title before or since that

(1) 3 App. Cas. 641.

instrument. But the plaintiffs have produced document after document, from 1605 to the present time, showing, as far as it is possible to show on paper, a perfect title to the fisheries on the Lough and river, and at the same time have given conclusive evidence of a long enjoyment of the really valuable part of those fisheries. In these circumstances, I feel myself bound to draw the inference of fact that the rest of the fishings included in the plaintiff's documentary title—fishings of which no one has had exclusive possession—are held under the same title, and do not belong to an owner who I know does not exist, and whose right is a figment of the imagination. Before I finish I have a word to say about the cross-appeal. The judgment of Ross, J., while declaring the plaintiffs entitled to all the fishings of Lough Neagh, confines the injunction to Toome Bay. To this the plaintiffs object, and, no doubt, it seems somewhat illogical; but it is to be accounted for by the circumstances that led to this action. I have already said that, previous to 1905, although there was line-fishing for eels in the Lough, and some eels were occasionally taken in pollen draft-nets, this did not appreciably diminish the supply to the eel-fishery; and that, therefore, no attention was given to it. I am, however, satisfied by the evidence that within the last few years a systematic attempt has been made to capture eels in Toome Bay in large quantities, and that this attempt has been assisted by the judgment of this Court that the Board of Conservators are bound to issue licenses for eel draft-nets which had never been licensed before, and which are illegal without a license. We were careful to point out that our decision was quite irrespective of any right to fish with licensed nets. We merely held that a person paying the license-duty had a right to receive a license, although he might not be entitled to catch a fish with the licensed net. It is sworn that the result has been that fish are now taken in large quantities in Toome Bay by licensed eel-nets, and that this has proved very injurious to the weir fishery. Ross, J., seems to have thought (and he was probably right) that this fishing would be comparatively harmless in other parts of the Lough, and, therefore, he confined his injunction to the place where the injurious acts were committed. But, while I appreciate his motive in thus framing the injunction, I am

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disposed to admit that it ought not to be so limited without the consent of the plaintiffs. Still, as comparatively little injury to the eel-fishery is done in the rest of the Lough, I am willing to leave the judgment as it stands, if my colleagues take that view.

THE LORD CHANCELLOR :—

I concur, and but for the importance of the case would not think it necessary to add anything to the judgment just delivered. The judgment of Mr. Justice Ross, which is under review, has affirmed the existence in the plaintiffs of the exclusive right of fishing for eels, and to all eel-fisheries, in Lough Neagh.

The extent of the waters over which this exclusive right is claimed invests this case with more than ordinary interest. Lough Neagh contains 150 square miles in area. It is 24 miles long, is navigable, but non-tidal, and is bounded by five counties. Its waters, which are fed by thirteen rivers, converge at the north-western corner of the Lough into Toome Bay, in which the exit of the waters to the sea lies. This exit—the sole one—is the Lower Bann, which finds its way to the sea at Coleraine. The lake abounds in fish—salmon, eels, pollen, or fresh-water herring, and also trout, and various kinds of coarse fish. The first two are of great value, and pollen also are a commercial asset of considerable value.

The defendants are members of the public. They do not assert any individual title in themselves, but the public have fished for and taken eels on Lough Neagh, by long lines, so far as living memory extends, without interference by the plaintiffs or their predecessors in title; and considering the long duration of this practice, and that it has given support and employment to a very large number of people in the counties round the lake, the case of the defendants is one which deserves and has received careful consideration.

The plaintiffs, on the other hand, assert a right of property in the eel-fishing in the Lough, which, if it exists, and has been established, we are bound to protect. They have proved a paper title of great antiquity, beginning with one derived by grant from the Crown in the year 1605; but a Crown title to the waters and soil of, and fishing in, an inland non-tidal lake, is by itself of no

value, because nothing is better settled than that the Crown is not of common right entitled to such.

The plaintiffs must produce evidence that the subjects granted were in the Crown at the date of its patents. This is a question of fact to which, from its very nature, the evidence of living witnesses cannot be applied. The best evidence of it is possession or enjoyment under the patents. The onus, of course, lies on the plaintiffs, and the main question is, whether they have discharged it. It is not a question of direction to a jury, but one to be found by the tribunal of fact, either the jury or the Judge of the Chancery Division, who is the judge of fact. *Bristow v. Cormican* (1) has settled that. Having regard to that *prima facie* infirmity in the plaintiffs' case, I must mention another rule of our law binding on us, viz., that there cannot exist a right in the public, as such, to fish in the waters of an inland non-tidal lake like Lough Neagh. I need only refer to the judgment of the Lord Chief Baron in *Bristow v. Cormican* (2) in proof of this.

I am not losing sight of Mr. Healy's argument, founded upon the 65th and 114th sections of the Fisheries Act of 1842. The 65th excepts from its provisions cases "where a general public right of fishing for salmon with such nets in the nature of a common of piscary has been enjoyed for a space of twenty years next before the passing of the Act"; and the 114th section, by a proviso, saves from the definition "any public right of fishing by lawful means, and in lawful seasons, heretofore enjoyed." Those sections do not create a right. There was a misapprehension as to the law, and a saving was based on that.

In addition to the cases on this point in Ireland, the cases in England of *Smith v. Andrews* (3) and *Blount v. Layard* (4), cited in the note to *Smith v. Andrews* (3), are express authorities, and show the use which can be legally made of evidence of fishing by the public. The same class of evidence, and for the same object, was given and admitted in *Devonshire v. O'Neill* (5). It makes no difference for the particular point that the fishing was in tidal waters.

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(1) 3 App. Cas. 641.

(4) [1891] 2 Ch. 681, n.

(2) 1. R. 10 C. L. at pp. 402, 403.

(5) 8 App. Cas. 135.

(3) [1891] 2 Ch. 678.

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I shall now give a short summary of the plaintiffs' paper title to the eel-fishery as it exists in documents proved. I do not feel justified in giving more than a summary of it, having regard to the elaborate statement of it in Mr. Justice Ross's judgment, and the statement in the judgment of Lord Justice Holmes, which he has read. It begins with the inquisition taken in Antrim on the 12th July, 1605, which finds that Queen Elizabeth was in her lifetime seized in her demesne as of fee in right of her Crown of all fisheries, salmon, and eels, and other fish in the moiety of Lough Neagh, and of certain ancient eel weirs in or over the River Bann next Castle Toome, and a free fishery of eels, salmon, and other fish therein and over the said river, all in Claneboy.

Then follow the Letters Patent, 14th February, 1605; Inquisition, 6th April, 1621, finding the seisin of King James I; Letters Patent, 20th November, 1621; the surrender, 1st July, 1640; lease, 14th August, 1656, from the Protector, reserving substantial rents for Lough and river. The reservation of rents in this lease, of £6 for the Lough and £44 for the river, is a striking testimony to their comparative values even then. Lease, 14th November, 1660; Letters Patent, 3rd July, 1661, to the Earl of Donegall, which admittedly vested in Lord Shaftesbury. The subject of those six grants or leases is the same in substance as described in the Patent of 14th February, 1605, the entire fishing of every kind whatsoever in Lough Neagh and the River Bann as far as the Salmon Leap in the counties of Down, Tyrone, and Antrim, and Londonderry, with certain old weirs for taking eels in or over the river; the River Bann near Castle Toome: and the full right of taking and carrying salmon and all kinds of fish in Lough Neagh and the Bann, within the limits aforesaid, and the bottom and soil thereof, with certain incidental rights of access, and placing nets.

The eel-fishing of lake and river is comprised in the one grant, and it is to that one grant acts of ownership must be referred. We find in the case of leases substantial rents paid by the lessees under the leases.

The Earl of Donegall had acquired the right to the fisheries in lough and river by the Patent of the 3rd July, 1661, and he

subsequently proceeded to demise the eel-fishing in the river Bann.

There is a lease to Fynaston, 3rd November, 1795, lease 1st August, 1827, assignments, 28th September, 1850, and 25th June, 1855; agreement for surrender, 28th January, 1904; and lease by Lord Shaftesbury, 18th July, 1905, of the eel-fisheries in the Lough and river and the fishing places for eels in the Lough, for a term of 5000 years to O'Neill at a rent of £884 4s. 7d.; and there are sub-leases from O'Neill to the plaintiffs Bruce and Ellis under lease 20th October, 1905, at a rent of £2550. The fines paid and rent reserved show how valuable the eel-fishery was considered. The salmon and other scale fisheries in the lough were differently dealt with by Lord Donegall after 1661.

So far as regards the rights of the plaintiffs, and those through whom they derive, to the eel-fisheries in the Bann at Toome Bridge Bay, they have been established over and over again, both by the verdict of a jury and by decrees in Chancery, and they are not challenged in the present action; and therefore the right to take the eels entering the Bann is beyond question.

The value of that, and its exercise, on the rights granted by the Patent I have mentioned remains to be considered. It can be best appreciated by considering the habits of eels and the position of the river Bann, which is the only exit to the sea from Lough Neagh at Toome Bridge.

I do not think we know about eels all that is to be known, but we do know that they spawn in the sea in brackish water, and ascend the river in spring in great numbers, little bigger than threads, and that having ascended to a lake and attained maturity by feeding on meadows and so forth, they at some period of maturity descend to the sea following the instinct of procreation; whether it is only females that ascend, or whether they attain maturity in the one season is not material. It is undoubted that mature eels descend to the sea in vast quantities between July and January, the quantities varying according to climatic conditions; and in the case of Lough Neagh they make for Toome Bay, and descend to the sea by the Bann river, meeting there at its entrance the eel weirs designed for their capture. It is obvious therefore that from a commercial point of view the fishery at the

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 1908. position; and that those who have the right, and exercise the right,
O'NEILL of fishing for eels, substantially enjoy the fishing for eels in
v. Lough Neagh; and this is an enjoyment under the one grant by
JOHNSTON. the mode which nature and experience have supplied. Taking of
The Lord eels elsewhere, and by methods such as long lines, might well be
Chancellor. regarded as unimportant. It is true that in recent times, when
 licenses were given to nets, which were used extensively in Toome
 Bay, there has been a taking of eels seriously interfering with the
 plaintiffs' rights, as it has been carried on where the descending
 eels congregate. This is but a recent practice, and has led to the
 present litigation.

The case of *Bristow v. Cormican* (1) only decides that there was a case which a tribunal of fact should decide; we have in the present case proved ten most material documents which were not proved in *Bristow v. Cormican* (1). It does not follow that in *Bristow v. Cormican* (1), even with its limited proofs, a verdict for the plaintiffs would not have been upheld. That was a case in which the evidence as to user was of a very insignificant character—and, where proved, remote from the spot, Feumore, at which the trespass to the several fishery, the subject of the action, was laid.

As this is an action conversant with eel-fishing rights only, the rights to the scale fish are not so material; but even as regards those, there is a series of documents from the time when the eel-fishery was made the subject of separate grants, and in most cases reserving the eel-fishery, which shows acts of ownership also in respect of them. There are lettings, reserving rents, convictions, and parol evidence as to warning off trespassers, which show an intention to exercise rights in respect of "the fishery in the lough." I may here say that if this case were conversant with, or included, an alleged exclusive right to take pollen, different considerations would apply; and I express no opinion as to what the result would be in such a case.

Since the argument, there has been reported a case of *Chesterfield v. Harris* (2) in the Court of Appeal in England. The marginal note is—

(1) 3 App. Cas. 641.

(2) [1908] 2 Ch. 397.

"A prescription in a *que* estate for a *profit a prendre in alieno solo*, without stint and for commercial purposes, is unknown to the law.

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"Therefore, where by way of defence to an action of trespass by riparian proprietors, the alleged trespass consisting in fishing in a non-tidal reach of a river of which the plaintiffs claimed to be the owners, the defendants set up a prescriptive right to a free fishery or common of fishery vested in the freehold tenants of a certain manor or hundred, whose freeholds were situate in any of the parishes adjoining the river, and proved that they and their predecessors in title as such freeholders in exercise of such alleged right for three centuries past had openly and notoriously fished from boats with nets for salmon and other fish, in the portion of the river in question, and sold the fish so caught in the market:—

"Held, that the Court could not presume a legal origin for the alleged right."

The Court approached the consideration of the right claimed by the defendants with, as the Master of the Rolls says (1), "an anxious desire to support, if it be possible, a right which I am satisfied has been not only claimed, but also exercised openly and continuously far beyond living memory, and for at least three centuries."

That case is very useful to show the legal limitations to the claim of a *profit a prendre*—which a right to fish is. It was a claim for a right to fish without stint and for gain, as appurtenant to every free tenement in the said parishes; and it was held such a claim could not lawfully exist—whether by custom, which is inapplicable to a *profit a prendre*, or by presumption of grant or otherwise.

The claim of the defendants here of a public right of fishing cannot, I think, have any lawful origin at all. It is unnecessary to say anything as to the contention that there was an abandonment by the plaintiffs' predecessors in title of the several fishery, which is impossible in law, or a transfer of it to some other person whose existence, as distinct from the whole public, is only imaginary. As regards the cross-appeal, I entirely concur in the limit

(1) [1908] 2 Ch. 407.

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placed on the injunction by Mr. Justice Ross. The mainstay of the plaintiffs' case is, that the real enjoyment of the eel-fishing is and always has been in Toome Bay, and by the eel weirs at the entrance to the lake, and that by the grant of the weirs there was granted the mode of enjoyment of what was in the Patents as a whole. The plaintiffs cannot reasonably complain if, in the discretion of the Court, the absolute protection by injunction is limited to that.

FITZ GIBBON, L.J. :—

The full statements of this case by Ross, J., and Holmes, L.J., and the observations of my Lord Chancellor, have shortened what I have to say, and I hope to avoid repetition as far as possible. But it is my duty to state, on my own responsibility, the ground of my concurrence with my colleagues, which will supplement to some small extent what they have said.

In my view, the question which we have to decide has been limited by decisions binding this Court, and has been defined by the judgments of the Lords in *Bristow v. Cormican* (1); while the duty of determining that question has been made imperative upon us by the course of the litigation.

The Exchequer Chamber, in *Bloomfield v. Johnston* (2) in 1868, decided that, though Lough Erne was a public navigable highway, yet, being non-tidal, it was not a public common of fishery. In *Bristow v. Cormican* (3), in the Exchequer in 1874, the questions whether the law as to inland lakes and inland seas is the same as the law with respect to rivers, and whether the word "navigable" in the one case has the same legal meaning as in the other, were treated as having been closed, so far as Ireland was concerned, by *Bloomfield v. Johnston* (2); and in the Exchequer Chamber in 1876, in *Bristow v. Cormican* (3), dealing with Lough Neagh, the law that there can be no public right of fishing in non-tidal waters was stated to be "so clearly settled that it must be followed by every Court until it is altered by a decision of the House of Lords" (p. 413).

In 1878 in the House of Lords, there were suggestions that

(1) 3 App. Cas. 641. (2) I. R. 8 C. L. 68. (3) I. R. 10 C. L. 398.

this might be a fit question to raise in some other case, but it was not then raised, because "the only question brought before the House was, whether the Judge who tried the cause was, as a matter of law, justified in directing the jury to find a verdict for the plaintiffs" (p. 660). He could not do so unless it was *conclusively* shown that the King had title to Lough Neagh when he purported to grant it to the plaintiffs predecessors, and the Crown not being of common right entitled to the soil of lakes, this could be shown only by the production of (i) a sufficient documentary title, and (ii) by evidence of possession sufficient to satisfy the tribunal of fact that the title was, in the words of Ross, J., "real and effective."

In *Bristow v. Cormican* (1) that tribunal was a jury. In this case it was Ross, J., and it is now this Court. The course of the litigation has, in my opinion, inexorably made it our duty to determine it. It is no longer open to suggest that it might or should have been submitted to a jury. Ross, J., rightly says (2): "In coming to a conclusion on the whole matter, I am obliged to take upon myself, not merely the responsibility of a Judge, but also that of a jury. As a Judge I must decide what evidence is proper to submit to my mind as a juror; and as a juror I must draw the proper inferences of fact."

We are in the same position now. We must decide all questions of law arising on the title and evidence, and then find the verdict upon the fact of possession which, in our opinion upon the evidence, a jury ought to find.

I think it right to point out how this duty has been thrown upon us, lest it might be suggested that we are usurping the function of a jury. It has been done by the parties; neither of whom has, at any stage of the litigation, either here or below, even suggested the empannelling of a jury. It was not for any Court to devolve its duty upon another tribunal. No Court can do so, unless for good cause and on the application of one or other or both of the parties, though there have been some instances in which a Chancery Judge has suggested that an issue of fact should be sent to a Common Law Division, or has even required that it should be tried by a

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(1) I. R. 10 C. L. 398.

(2) [1908] 1 I. R. 383.

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jury before himself. This Court, regarding the spirit as well as the letter of the Judicature Act, 1877, in *The Secretary of State for War v. Studdert* (1) considered the law and practice as to the right of trial by jury under the Judicature Act, and cleared the statement of claim of every allegation which was not equitable, and the prayer of everything but equitable relief, before permitting the plaintiff to proceed to trial without a jury in the Chancery Division. In *De Freyne v. Fitzgibbon* (2) it went further, and on appeal from the Vice-Chancellor, having regard to the nature of the case, in the exercise of its discretion, it directed the issues of fact and the amount of damages to be determined and assessed in the Chancery Division by a jury. But this case has been tried and determined by the Chancery Judge, and it has been heard upon appeal, and it must now be determined by this Court as the tribunal of fact as well as of law, without any application, or even suggestion, that a jury should be empannelled to try any question which arises in it. Several important English cases, notably those relating to the fisheries in the Thames at Mapledurham and in the Wye, have been similarly decided in the Chancery Division without juries, and I am not to be taken as suggesting that a trial by jury ought to have been ordered here. However that may be, we must now determine two matters—(i) the sufficiency of the documentary title; (ii) the persuasiveness of the evidence of possession under that title; and on each of these points, the opinions of the Judges and Lords who heard *Bristow v. Cormican* (3) appear to me to support the judgment of Ross, J., even on the case as it then stood. The plaintiffs case is much stronger now than it was then. The documentary title in *Bristow v. Cormican* (3) began with a lease from Charles II. to Clotworthy of November 15, 1660. The documentary title of the present plaintiffs begins with the commission and inquisition of 1605, which are evidence of seisin in the Crown at that date, and it includes the long list of other additional documents enumerated by Ross, J. (4), among which are the Chichester inquisition patent and surrender of 1621 and 1640, and Cromwell's original lease to Clotworthy of August 14, 1656. These additional documents dis-

(1) [1902] 1 I. R. 240.

(3) I. R. 10 C. L. 111; 3 App. Cas. 641.

(2) [1904] 1 I. R. 400.

(4) [1908] 1 I. R. 378.

place some, and they weaken all, of the unfavourable observations made in the Irish Courts, and in the House of Lords, upon the documentary title to the bed and soil and fisheries of Lough Neagh as then in evidence; yet no Judge or Lord who heard that case suggested that the documentary title was insufficient, if supported by evidence of possession under it, or that a verdict of a jury for the plaintiffs could have been disturbed upon any ground.

The evidence of possession also has been supplemented—notably by the Crown rental of 1619, proving payment of rent under Hamilton's Patent of 1605, the Chichester documents, and in later times, as to the salmon fisheries in the Lough, by the Donegall rentals, and in the Bann, by the leases, documents, and legal proceedings as to the eel fisheries, including the trial before me at Belfast in 1879.

Having read all the judgments in *Bristow v. Cormican* (1) I see no reason to doubt that every Judge and Lord who heard that case would have upheld the verdict which Ross, J., has now found as to the eel fisheries, if it had been then found by the jury as to the salmon fishery, even on the title and evidence then presented—a *fortiori* that verdict must have been upheld if the stronger case now made had been then in proof.

The Chief Baron, in the Exchequer, said that the possession of the fishery, if it went with the title, would be evidence that the title, thus accompanied by possession, was a lawful title.

In the Exchequer Chamber, Lawson, J., supporting his own direction, said :—

“The plaintiffs established as clear a documentary title to a several fishery in the entire of Lough Neagh as ever was submitted to a Court.”

Fitzgerald, J. and O'Brien, J., who upheld the Exchequer, said that the case must really depend—not on any defect in the paper title—but “on the possession and enjoyment under the Crown grants,” and that “the evidence was sufficient to warrant the jury in finding the plaintiffs right to a several fishery in the *locus in quo*, in case the question had been submitted to them.”

(1) I. R. 10 C. L. 111 ; 3 App. Cas. 641.

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In the Lords, Lord Cairns (p. 653) had

“No doubt that the lease of 15th November, 1660, to Clotworthy and the payment of rent under it, would be evidence to go to a jury of seisin and ownership by the Crown at that time.”

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And he said (p. 655) that, though the plaintiffs had produced evidence of ownership, this evidence was, from its very nature, evidence to be submitted by the Judge to the jury, with proper observations and explanations, and was evidence, the effect of which it was for the jury to determine.

Though Lord Hatherley observed (p. 658) on the meagreness of the documentary proof, he described the case (p. 659) as being one in which upon a new trial other and complete evidence—manifestly meaning evidence of possession—might be produced.

Lord Blackburn expressly said (p. 665) that there was evidence proper to be submitted to the jury, from which they might draw the inference of fact that the plaintiffs had title, but not more.

As to acts of ownership on parts of a tract he said that the weight of the evidence depended on the nature of the locality and of the acts, and on what it was reasonable for a jury to infer; that the different pieces of evidence must all be taken together, and when together formed a much stronger case than the sum of the cases which each separately would make (p. 670). But, in his opinion, they did not altogether amount to such a case as that the jury could properly be directed that there must be a verdict for the plaintiff.

The first argument addressed to us against the earlier documents now produced (1) was that

“The inquisition of 1605 finds only half the Lough to be in Queen Elizabeth.”

I think this is a mis-translation. It was an Antrim inquisition, and it found the Queen to have been in her lifetime seised in her demesne as of fee, in right of her Crown of England, of all manner of fisheries, as well of salmon as of eels and other fish—

“*In et supra totam illam medietatem stagni de Lough Eaugh prædicti que existit versus orientem parcellam de Claneboy prædictæ in comitatu prædicto.*”

Medietas is a technical word. It does not necessarily mean half, or equal moiety, and I suggest that this is not a description of half or of any other undivided part of Lough Neagh, but that it is the proper description of so much of the eastern side of the lake as lay off Clandeboy in the County of Antrim. It is equivalent in meaning to "*usque ad medietatem*"; it covers all of the lake which was in the County in which the inquisition was held, and when the finding declares that the Queen had *the Antrim part of the Lough*, it may thereby make it more probable that the rest of it in other Counties was also vested in the Crown; but it certainly raises no presumption against the validity of the subsequent inquisitions, patents, and other documents which describe and treat the whole Lough, and the bed and soil of every part of it, and the entire fishing of every kind therein, as being vested in the King.

Even if Hamilton's patent of the following February went beyond the inquisition of 1605 in granting the whole Lough, this would not deprive it of the force of evidence of possession, when supported by the proof of payment of rent in 1619, and afterwards by the inquisition and grant to Chichester in 1621.

Much of Mr. Healy's argument was directed to show, historically, that the Crown had no actual possession of Lough Neagh in the reigns of Elizabeth and James I, and he sought to account for the restriction of the finding that a part only was vested in Queen Elizabeth by suggesting that the possession of the rest was then governed by the law of tanistry, or by patriarchal Celtic customs by which the still unconquered chiefs held the Lough as trustees for the public, or subject to public rights of fishing, of which he suggested that the fishing by the defendants was in some way a survival.

Granting that some of the Counties adjoining Lough Neagh were among the last to be brought under English rule, I have never before heard it suggested that the possession of Irish land could be governed otherwise than by the laws of the Irish Parliament, and of the United Kingdom. *Magna Charta* is relied upon in the portions of his argument as to putting Lough Neagh "in defence"; and it was never suggested in *The Black-*

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Appeal. *water Fishery Case* (1) that the grant of the Desmond territory to
 1908. Thomas FitzAnthony in the thirteenth century, or the possession
 O'NEILL under it, could be affected or controlled by Irish law or custom. The
 v. "state of the country" in Connaught has never, to my knowledge,
 JOHNSTON. "state of the country" in Connaught has never, to my knowledge,
 Fitz Gibbon, been invoked to qualify the operation of the comprehensive patents
 L.J. which have been the recognized roots of title for many centuries
 in that Province. Accordingly, I consider the sufficiency of
 the evidence of possession of Lough Neagh, and of its bed, soil,
 and fisheries, as being governed by the same law which regulates
 the proof of title to real property in all other parts of Ireland.

The documentary title to the whole Lough, to all its bed and soil, and to all the fishings in it is the same, and it is identical with the title to the river Bann, and to all its fishings. The separation of the scale fisheries from the eel fisheries was the act, not of the Crown, but of the grantees under the Crown. The Crown title, if it passed anything in the Lough, passed the eel fisheries and the scale fisheries at the same time, and by the same title by which the Bann and its fisheries also passed. The importance of this is that every act of possession or ownership of either fishery, or of any part of either Lough or river, is evidence of possession *under the patent title*, and evidence of the seisin of the Crown at the commencement of that title. If that title was once in lawful existence, and if evidence of possession under it has been given, it could not have been since abandoned, nor could any public right of fishing be established against it. No private title could be established against it, except by proof of exclusive possession, or of an independent title; and there is no such proof. The owner of any such title is as yet unidentified and undiscovered.

As to the scale fishing, I am greatly impressed by the evidence of possession, not only in the Bann, but also in the Lough itself, especially by the letting in 1797 of the bay and islands from Tunny Point to Gartree Point, a part of the lake much resembling Toome Bay as defined by Ross, J., in his injunction. We also have the other entries in the rentals, including the peculiar entries in 1800, 1801, 1807, and other years, of occasional

payments of rent for "Lough fishings." These latter are small in amount, occasional, and in a sense suspicious; but as well with regard to the scale fishing as to the eel fishing, we must consider all the circumstances and probabilities of the case, in determining whether the omission to deal specifically with the Lough at large is more naturally to be explained by the nature and circumstances of property, than by assuming that the defined fisheries in the river, and in the specified parts of the Lough, and no more, were in the possession of the Crown, and that all the inquisitions patents and other documents which purported to deal with the whole Lough were illusory and void, and only "pretenced titles," not as against the public, which could not have any lawful title, but as against some yet undiscovered owner or owners upon whom the public has been "squatting" for 300 years.

I can find little or no evidence of any profitable salmon-fishing in any part of the Lough, except by persons holding under the patent title. There is no evidence that salmon can be caught at all in the open lake. The strongest evidence apparently inconsistent with the exclusive possession of the scale fishing is that which relates to the pollen fisheries. It would be wrong now to anticipate any question which may hereafter arise as to that fishing, but, as at present advised, it seems difficult to reconcile the exclusive possession and enjoyment of the salmon fishery by the patentees of the scale fishing with the existence of any right in other persons to take pollen, or other scale fish, in the same waters. The alternative would be the conclusion that the fishing for pollen was not as of right, but was in fact permitted by the patentees, because it was not worth the cost of carrying it on under the patent or of preventing others from carrying it on, having regard to the difficulty of stopping it, or because of the comparative insignificance of any damage which it did to the really valuable scale fishery—namely, that for salmon.

The line-fishing for eels, which was the only eel fishing of any magnitude in the Lough until the recent introduction of draught nets, is open to the same explanation. It would have been most difficult to restrain, and it was only infinitesimally injurious to the fishing of the patentees and their lessees by means of the weirs upon the river.

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Appeal. Instances of small *profits a prendre* enjoyed without title,
 1908. but without interference, are common: gathering windfalls in
O'NEILL woods, gleaning corn land, gathering mushrooms in pasture
v. or blackberries in hedge-rows, seem to me to be analogous to the
 JOHNSTON. catching of pollen by the public in Lough Neagh. To my
 Fitz Gibbon, mind, the conclusion of the whole matter, on the evidence, is
 L.J. this—the patentees and their lessees have regularly harvested
 the annual and valuable crops of salmon and eels, by means of
 their nets and weirs, in the ancient and accustomed fishing places
 in the bays and river. But they have not interfered with the
 picking of pollen or the hooking of eels by the poorer inhabitants
 in the open Lough. There is probably no fishery which can be
 so easily carried on profitably in its own special way, and which is
 at the same time so little exposed to serious injury from casual
 fishing by unauthorized persons, as is the eel fishery of Lough Neagh
 and the Bann.

I do not think that Ross, J., is right in thinking that the
 “mere threads” which come up the Bann in spring, all proceed
 seawards a few months after, weighing several pounds, and
 leaving practically no eels of the ordinary species behind them in
 Lough Neagh. The mysteries of migration are not yet completely
 solved, the Lord Chancellor has mentioned some of the later
 theories about eels, but it is certain that vast quantities of mature
 eels present themselves at certain seasons for easy, profitable, and
 wholesale capture at the exit from the Lough, and that the
 fishing places in the Bann, from time immemorial, and for 300
 years under the title now impeached by the defendants, have
 been places where the produce, in the way of fish, of the great
 catchment area of the river has been turned to account by those
 who own the exclusive rights of fishery, which for all that time
 have been private property.

I cannot believe that all the documents of title in the case rest
 upon usurpation or pretence, or that the possession under them
 has been wrongful, or that it has not extended to Lough Neagh,
 as well as to the Bann, so far as possession of the Lough has been
 necessary to the enjoyment of the granted property. No other
 fishing in the Lough which may have taken place, can be referred
 to any lawful origin as against the patentees; and what has taken

place is not sufficient to show that the patentees have had no title. The fact that fishing for pollen has been made the subject of certain Acts of Parliament dealing with close-time nets and modes of fishing, is no more capable of creating a public right of scale fishing than are the 65th and 114th sections of the Act of 1842 (5 & 6 Vict. c. 106, ss. 65, 114) capable of creating any right of fishing for eels against the plaintiffs by the mention or saving of "any public right of fishing by lawful means and in lawful seasons, heretofore enjoyed and exercised within the limits of several fisheries in non-tidal waters."

Since the argument *Chesterfield v. Harris* (1) has been reported in the English Court of Appeal. It appears to me to go much farther upon the evidence than we are here called upon to do, for it was in that case held that a legal origin for a right of free fishery in the freeholders of five parishes adjoining a long stretch of the river Wye, could not exist against the owners under a paper title, whose only evidence of possession was leases and receipt of rent, which the Court treated as "ample evidence of possession" although it was proved that the alleged right of the freeholders had been asserted in pleas of the Crown, presentments, and perambulations going back to 1292, and that they had for three centuries openly and notoriously fished with nets for salmon and for other fish, which they sold in Birmingham and elsewhere; and that the plaintiffs and their predecessors had been defeated in proceedings for the assertion of their exclusive right of fishery. The Court nevertheless held them entitled to judgment in trespass and to an injunction, with costs of the action and of the appeal.

For these reasons, and adopting the other reasons given by my colleagues which I do not repeat, I concur in dismissing this appeal with costs.

The order under appeal declares the plaintiffs right over the whole Lough; and as I hold them entitled to that right, I should have thought it better to make the injunction co-extensive with it, but I am content to leave the injunction as it stands, if it is understood that the liberty to apply which has been reserved, will entitle

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(1) [1908] 2 Ch. 397.

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JOHNSTON. I can only hope that if the new practice of fishing with draft-nets is abandoned, or continued under license only, the old and comparatively harmless fishing with long lines may, as heretofore, be permitted to continue. The draft-nets in Toome Bay began the trouble, and perhaps their discontinuance will end it.

Fitz Gibbon,
L.J.

Solicitor for the appellants (defendants): *L. A. Meenan.*

Solicitors for the respondents (plaintiffs): *French & French.*

W. G.

Appeal.
1909.
June 7, 8. IN THE MATTER OF THE ESTATE OF JOHN WILLS,
DECEASED.
JOHN SCOTT WILLS v. JAMES WILLS AND GEORGE
HORNIDGE; MARY E. WILLS, FRANCES E.
WILLS, KATHLEEN WILLS, AND SAMUEL IORTON
WILLS (1).

Will—Construction—Arrears of rent.

Lands were limited under a testator's marriage settlement to the use of the testator for life, with remainder to his eldest and other sons in tail male, with an ultimate remainder in fee to himself. The testator was the owner of other unsettled lands, in respect of which, as well as of the settled lands, there were arrears of rent owing to the testator at the time of his death.

The testator by his will devised and bequeathed unto his eldest son absolutely all his "real and chattel real property, whether in possession, reversion, remainder, or expectancy," or over which he had power of disposition, "together with all rents and arrears of rent due thereout," at the time of his death. He also directed that all outgoings charged thereon, or payable thereout, at the time of his death should be paid out of such rents, and bequeathed all his personal estate not otherwise disposed of by the will upon trust for his children:—

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

Held, by the Court of Appeal (FitzGibbon and Holmes, L.JJ. ; the Lord Chancellor dissenting), reversing the decision of the Master of the Rolls, that, on the true construction of the will, the testator's eldest son was entitled to the rents and arrears of rents due out of both the settled and unsettled lands at the time of the testator's death.

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By a marriage settlement, dated the 31st day of May, 1881, and executed on the occasion of the marriage of John Wills and Mary Helen Scott, freehold lands in the county of Dublin were limited to the use of the said John Wills and his assigns for his life, and from and after his decease, subject to a yearly rentcharge by way of jointure, and also subject to a term of years to secure portions for younger children, to the use of the first and every other son of the said John Wills successively in tail male, and in default of such issue to the use of the said John Wills, his heirs and assigns for ever.

The said Mary Helen Wills died in the lifetime of her husband, who, on the occasion of his second marriage, in the year 1893, exercised the power reserved to him in the above-mentioned marriage settlement of charging the said lands with a jointure in favour of his second wife.

The said John Wills died on the 6th day of October, 1895, leaving his widow, one son, the above-named plaintiff, and three daughters of the first marriage, and one son, the only child of the second marriage, him surviving. The said John Wills was, at the time of his death, absolutely entitled to lands in the county of Dublin other than those comprised in the said settlement, of which portion was held for a long term of years, and the remainder under a fee-farm grant.

The will of the said John Wills, dated the 23rd day of December, 1894, after giving certain specific bequests, was in the following terms:—"I devise and bequeath to my said son, John Wills, absolutely, all my real and chattel real property, whether in possession, reversion, remainder, or expectancy, or over which I have power of disposition, together with all rents, and arrears of rents, due thereout at the time of my death. And I direct that all outgoings charged thereon, or payable thereout, due at the time of my death, be paid out of such rents. I bequeath all my personal estate whatsoever (except what I otherwise dispose of by

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this my will, or any codicil thereto) unto my brother, James Wills, and my cousin George Hornidge, their executors and administrators, upon trust that the said James Wills and George Hornidge, or the survivor or survivors of them, or the executors or administrators of such survivor, shall sell, call in, collect, or otherwise convert into money such parts of the said trust premises as shall not consist of ready money, and shall out of the moneys to arise from such sale, calling in, collection, or conversion, and the ready money of which I shall be possessed at my death, pay my funeral and testamentary expenses, and debts and legacies, other than specific, bequeathed by this my will, or any codicil hereto, and shall invest the residue of said moneys in the names or name or under the legal control of the said trustees or trustee, in any stocks, funds, shares, or securities, which may be, for the time being, authorized by statute or order of the Court for investment of trust moneys . . . in trust for all my children, or any my child, who being sons, or a son, shall attain the age of twenty-one years, or being daughters, or a daughter, attain that age or marry, and if more than one in equal shares. And I declare that such last-mentioned bequest is in addition to the provisions made for my children by my marriage settlement."

This will was duly proved by the said James Wills and George Hornidge, the executors therein named, two of the above-named defendants.

At the date of the testator's death the net amounts of the arrears of rent owing out of the settled lands and unsettled lands of the testator respectively were £799 6s. 5d., and £88 15s. 2d. This summons was taken out by the plaintiff, the eldest son of the testator, for the determination by the Court of the question whether, on the true construction of the will, the plaintiff was entitled to the rents and arrears of rent due at the date of the death of the testator of both the settled and unsettled lands.

Ronan, K.C., Samuels, K.C., and T. Henry Maxwell, for the plaintiff.

S. L. Brown, K.C., for the defendants.

On the 13th May, 1909, THE RIGHT HON. THE MASTER OF THE ROLLS gave judgment as follows:—

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I sincerely regret that the parties to the action of *Wills v. Wills*, while settling by consent every other question arising between them, left this particular question outstanding for judicial decision, because, if ever there was a testamentary gift in respect of which opinion might fairly differ, that gift is here.

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The discussion involves (as Mr. Brown suggested) participation in the eternal conflict between the expressed and the assumed intention of the testator. Unhappily, perhaps, I cling to the expressed intention.

What has the testator, John Wills, actually said?

"I devise and bequeath unto my said son, John Wills, absolutely all my real and chattel real property, whether in possession, reversion, remainder, or expectancy, or over which I have power of disposition, together with all rents and arrears of rents due thereout at the time of my death. And I direct that all outgoing charges thereon, or payable thereout, due at the time of my death be paid out of such rents."

Now I think that the words "or over which I have power of disposition" are of importance. They amplify the scope and area of the testamentary gift. Mr. Ronan argues that his case is clear if you insert a *videlicet* after the word "disposition," and read the will thus, "viz.: my lands (unsettled) of Blackacre, and my lands (settled) of Whiteacre, together with all rents and arrears of rents, &c., &c." If you do that (Mr. Ronan adds), you leave little or nothing for argument.

The testator has not, however, inserted that *videlicet*. The testator deals, and, in my opinion, expressly says he deals, not with lands—the physical lands—but with his devisable estate or interest, whether it be in possession, reversion, and so on, in real or chattel real property. How can the Court, under such circumstances, and having regard to the language used, annex to the devise of an ultimate remainder in fee-simple a gift of arrears of rent payable to the testator in his capacity of tenant for life? Mr. Samuels relied on the concluding words of the clause—"I direct that all outgoing charges thereon, or payable thereout, due at the time of my death be paid out of such rents"—but I do not

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think that these words really assist the plaintiff's case. I think Mr. Brown's remark in reference to these words is worthy of consideration. Can it be seriously contended that the testator meant to render the rents and arrears of rents of the unsettled property liable for the "outgoings"—a parlous phrase—charged or payable out of the settled property.

Whatever the ultimate decision of this case may be (and the parties by requesting an adjournment into Court have suggested further developments), my opinion is that the answer to the main question should be—"The plaintiff is entitled to the rents and arrears of rent due at the death of the testator out of the unsettled lands only."

Costs must come out of the personal estate.

The plaintiff appealed.

Ronan, K.C., and Samuels, K.C. (with them T. H. Maxwell),
for the appellant:—

The bequest of rents and arrears of rent cannot be limited to what was due out of the unsettled lands alone. The intention of the testator is clear, namely, that his eldest son, who took the settled lands under the settlement, and who was to take the unsettled lands under the devise, should also be entitled to all rent and arrears of rent owing out of all the lands. That only the testator's ultimate remainder in fee in the settled lands passed along with the unsettled lands under the devise is immaterial, as the rents were payable, not in respect of a particular interest in the lands, but out of the lands themselves, and an interest in the settled lands, namely, the ultimate remainder in fee, did in fact pass under the devise; the subject-matter therefore, out of which the rents and arrears of rent bequeathed were due, was clearly not the unsettled lands alone. The direction as to outgoings is in favour of this construction; and, having regard to the respective amounts of the arrears due out of the settled and unsettled lands, it would be unreasonable to suppose that the testator intended to bequeath only the small amount of arrears due out of the unsettled lands.

A. C. Meredith, K.C., and *Chadwick* (with them *S. L. Brown, K.C.*), for the respondents:—

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The Court has no power to make a will for the testator, and the intention of the latter must be gathered from the words used in the will and from them alone. The testator did not bequeath to his eldest son all the rents and arrears of rent due to him at the time of his death; he devised and bequeathed all his real and chattel real property, &c., *together with* all rents and arrears of rent *due thereout*: these words show that the gift of rents and arrears of rent must be co-extensive with the devise of the lands. The lands devised were (1) the unsettled lands, and (2) the ultimate remainder in fee in the settled lands, out of which obviously no arrears of rent were due, and, consequently, the bequest of rents and arrears of rent is limited to those due out of the unsettled lands. Such arrears afford an ample subject-matter for the operation of the bequest, as also for the direction as to outgoing. The will contains a clear bequest of the testator's residuary personal estate, and, if the former clause is doubtful, which we do not admit, this bequest should be held to capture the arrears due out of the settled lands.

Ronan, K.C., in reply.

THE LORD CHANCELLOR:—

In this case a conflict has arisen between the plaintiff, who was the eldest son of the testator, John Wills, and his brother and sisters, as to the true construction of their father's will. [His Lordship read the clause in question, and continued:—]

June 8.

The testator was entitled under his marriage settlement to certain freehold lands for life, which after his death were limited under the settlement to the use of his eldest son in tail male, with an ultimate remainder in fee to himself. He was also entitled to other unsettled lands which he could devise, and out of both the settled and unsettled lands there were rents due at his death which were personal estate, and which if not specifically given to a devisee of realty would pass to a legatee of personalty, or devolve in intestacy.

It was quite open to the testator to say that his son, who

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would on his death succeed to his settled lands, should also have the rents due in respect thereof, and perhaps, if asked, he would have said such was his wish. He did not, however, say so, but he did make a gift of personal estate which *prima facie* includes the rents which were due at his death out of the settled lands. The question is, I think, What is the meaning of the gift of freeholds to John Wills, and what passes under it? the answer to that solves the question of what is the incident, the arrears of rent payable thereout; obviously only what the testator had title to devise.

It may well be that, but for the grouping of the rents incident to the devised estates with the estates given, there might be enough to give all rents due at the testator's death, but that is making an independent gift of the rents, and, I think, making a new will. The question is, What do the words of the will mean? I think they refer to the growing and accrued fruit of what passes under the devise, and not a subject different from and larger than what the devise of the realty passes. The words "together with" and "due thereout" limit the gift of rents to the subject in respect of which the previous devise operated. There is an express gift of "personal estate" which catches these rents, unless they are already disposed of.

Looking only to the words used for the finding of the intention—and I have no other function or right—I think that the Master of the Rolls construed the language rightly, and that the appeal should be dismissed.

FITZ GIBBON, L.J. :—

This case and the "next eldest brother's" case are remarkable instances to show how a testator, by the use of simple words, can produce hopeless differences of judicial opinion as to his meaning. Mr. Theobald, in the preface to his last edition, makes "honourable mention" of the testator in *Crofts v. Beamish* (1) "for his skill in puzzling the Courts of his country," and says that the case "illustrates in a remarkable way the determination of the Court not to be beaten by a testator, but to find a meaning for his

(1) [1905] 2 I. R. 349.

words if it can possibly be done." He charges me with having arrived at my conclusion by the "somewhat doubtful process" of summoning the testator as a witness, and putting leading questions to him. The learned author seems to regret that he was not there to cross-examine my witness, not on the words of the will, but on the words "next youngest son," which were not his. In this case, I think that if we ask a question, and take the answer, not from the testator but from the words of the will, we may decide the matter.

It is further remarkable that, in each of these cases, each Judge has expressed his conclusion with a clearness qualified only by a courteous reference to the opposing opinions of others—in the words of the Lord Chancellor, "with such clearness as is consistent with another Judge having arrived at a different one."

This case depends on the meaning of the pronominal word "thereout." I ask, "Out of what?" What is the antecedent of "thereout"? An answer in the very words of the will, "out of all my real and chattel real property," disposes of the case, because the settled lands were part of the testator's real property during his life, and he also had an ultimate remainder in them.

The subject-matter out of which the rents and arrears of rent were due which were bequeathed absolutely to John Wills was described in the words "all my real and chattel real property," and the subject-matter of the bequest was pure personalty, debts due by the tenants of the lands which were the testator's property, and out of which rents were accruing to him, up to the moment of his death.

With all respect, I say that the confusion in the case arises from reading the words "whether in possession, reversion, remainder or expectancy, or over which I have power of disposition, as if they cut down the operation of the description of the property which had gone before, and restricted that description to lands, of which the testator had actually made a disposition by his will.

If I could speculate, I would read these words as the language of the solicitor who drew the will, and as "general words" used for the ordinary purpose, which is to extend, and not to cut down, the preceding particular words.

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Even as general words they are strictly appropriate to lands in possession only; rents and arrears of rent could not be due out of property in reversion, remainder, or expectancy, except in the rare case of a rent being payable *in presenti* under a reversionary lease, and the settled lands were in his possession during his life.

The subject-matter of the gift is money payable to the testator as rent or arrears of rent due to him before he died. I have no doubt that his real meaning was that his son John should take his place with his tenants, and that all money due by them should be recoverable by his son and successor, whether the succession arose by descent settlement or will.

We are entitled to "put ourselves into his chair," and to see the property which he had. He had a rental of about £1,100 a year from lands over which he had no testamentary power, but which went under the settlement. He mentions the settlement in his will, he knew that he was the life tenant only of the settled property; therefore, when disposing of rents due at the time of his death, he had it present to his mind that his money assets included rents due out of the settled lands. The total amount of the rental of the unsettled land in his possession at his death was about £80 a year only. Therefore about thirteen-fourteenths of the total amount of rent due to him at his death will be excluded from the bequest, if we give the construction to the word "thereout" which excludes the arrears due on his life-estate in possession in the settled lands, and confines the bequest to arrears due out of lands which passed under the will itself. The words "or over which I have power of disposition" are alternative and additional, and there is no evidence that the testator had any such power, as distinguished from an estate.

Even if there was nothing more, I should feel certain that the testator intended that his son, on becoming the owner of the real and chattel real property passing on his death, whether by devise or by descent, should also become the creditor of the tenants of all that property, and should be entitled to deal with all rents due out of it. But there are other indications to the same effect, *e.g.*, in the clause directing the executors to sell, call in, or otherwise convert into money such parts of the trust premises as should not consist of ready money. These words are not appropriate

to the rents and arrears due. Again, he carefully balances all the outgoing charges upon or payable out of the property on which the arrears were due, by directing that they shall be paid out of such rents. This provision is a strong indication that the son who got the lands should have the arrears also, but should pay the outgoing charges out of them. Why is the son not to pay the taxes due on the settled land out of the arrears of rent due out of the same land? I am clearly of opinion that the testator intended that all money due to him at his death by his tenants should pass to his son John, and that the bequest is not to be cut down to one fourteenth of the amount so due.

In my opinion the appeal should be allowed.

HOLMES, L.J. :—

The testator whose will is to be considered in this appeal was, under his marriage settlement, tenant for his life of lands of considerable value, with remainder to his eldest son in tail, and with an ultimate remainder to himself in fee; and at the date of his will, and at the time of his death, there was a considerable amount of arrears of rent due to him thereout. He was the absolute owner of other lands of comparatively small value, the rent of which was also in arrear to a moderate extent. In these circumstances, he executed his will by which he devised and bequeathed to his eldest son, absolutely, all his real and chattel real property, whether in possession, reversion, remainder, or expectancy, or over which he had power of disposition, together with all rents and arrears of rent due thereout at the time of his death; and he directed that all outgoing charges, charged thereon, or payable thereout, due at the time of his death, be paid out of such arrears.

It is impossible to doubt that the mental intention of the person who penned these words was, that all arrears of rent due to the testator at the time of his death should pass under this bequest of rents; but it is said that the words cannot be construed so as to give effect to this intention. I am glad to say that I am unable to give them any other construction. He devised to his son in express terms his reversion or ultimate remainder in his real property, including of course the lands specified in his marriage settlement, and out of these very lands there were due

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to him at the time of his death arrears of rent. I am at a loss to conceive how on any reasonable construction such arrears of rent can be excluded from the bequest. I feel that I could only come to this conclusion by applying to the language of the will a hyper-criticism which would be equally out of place if applied to a literary masterpiece or the slipshod English of ordinary life.

Solicitors for the appellants: *Bennett Thompson & McNeill.*

Solicitors for the respondents: *Longfield, Kelly, & Armstrong.*

R. ST. J. C.

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April 21.
May 12.

IN THE MATTER OF THE ESTATE OF RICHARD WARNEFORD BOYLE, OWNER; ROSABEL FLEUSS, PETITIONER (1).

Land Purchase Acts—Sale of estate to tenants by Land Judge—Bonus under Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 48.

An estate, the subject of an absolute order for sale in the Land Judge's Court, was sold by the Land Judge to the occupying tenants, the proceedings being instituted by a proposal and application under Form 34a, the purchase-money being furnished by means of advances of money in the manner provided by section 27 of the Irish Land Act, 1903; but no declaration having been made by the Estates Commissioners that the estate was fit to be regarded as a separate estate for the purposes of the Act:—

Held, affirming the decision of Ross, J., that the sale was not the sale of an estate under the Act of 1903 within the meaning of section 48 (1) of that Act, and that the bonus or percentage mentioned in the said section was not payable in respect of such sale.

APPEAL by the vendor from the order of Ross, J., made on the 22nd February, 1909, holding that no bonus was payable:— See *ante*, p. 120, where the facts and the judgment of Ross, J., are reported. The Form No. 34a with which the proceedings for a sale to the tenants were initiated, was as follows (2):—

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

(2) By notice, published in *The Legal Diary*, Dec. 14, 1903, the words "Guaranteed Land Stock" were directed to be struck out in this and Form 34.

FORM 34A.

Appeal.
1909.*Proposal by a Tenant to purchase his Holding from the Land Judges, and
Application to the Irish Land Commission for an advance for that purpose.**In re*
BOYLE'S
ESTATE.

IN THE HIGH COURT OF JUSTICE IN IRELAND.

CHANCERY DIVISION—LAND JUDGES.

LAND PURCHASE ACTS.

Record No. A

In the Matter of the Estate of

Ex parte

I, _____ the Tenant in
 occupation of the holding described in the
 Owner; first part of the Schedule hereto, hereby
 offer to purchase from the Land Judges for
 the sum of £ _____ the said holding,
 Petitioner. } provided the Land Commission shall make

the advance hereby applied for, and conditional on the said Lands being sold
 to me in fee-simple, discharged from all superior interests

and I hereby apply to the Irish Land Commission to advance to me, pursuant
 to the said Acts, the sum of £ _____ Guaranteed Land Stock, for the purpose of
 such purchase, which advance is to be repaid as is by the said Acts provided.

SCHEDULE.

County _____ Barony _____ Electoral Division _____					
Refer- ence to Map.	Ordinance Survey Names of Townlands. [Each on a separate line.]	Area Statute Measure of the portion of each Townland to be sold.	Tenement Valuation.	Rent paid by Tenant.	Tenure of Tenant and Particulars of fixing of Rent, if a Judicial one. [See directions endorsed as to the filling in of this column.]
A. R. P. £ s. d. £ s. d. First Part—Description of Holding.					
Second Part—Additional land sold under the "Purchase of Land (Ireland) Amendment Act, 1839."					
N.B.—These lands must not exceed 10 acres statute measure in area, unless the tenement valuation be £10 or under. If the lands are not separately valued the ap- proximate valuation should be given.					

Signed by the said Tenant, &c.,

Dated this _____ day of _____, 190

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I, _____, the before-named Tenant, make oath and say, as follows:—

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1. That the particulars stated in the foregoing Schedule are true, to the best of my knowledge and belief.

2. I reside on, and have been in the occupation of, the said holding, and paying the rent therefor since the year 1_____, and I hold the same as Tenant, as in the said Schedule is stated (*and the said (1) _____ is in my possession*).

3. There is not any person in occupation of the said holding, as Tenant, or otherwise, save as mentioned in the following Schedule:—

Names of the Persons in occupation as undertenants or otherwise.	Area in Statute Measure.			Rent (if any) payable by such occupiers.			When payable.	Tenure or nature of occupancy.
	A.	R.	P.	£	s.	d.		

4. There is not any charge or incumbrance affecting my interest in the said holding, save those specified in the following Schedule:—

Schedule containing particulars of Mortgages, Charges created by deposit of Lease, or otherwise, or Charges in favour of the Commissioners of Public Works in Ireland, affecting the Tenant's interest in the Holding.					
Date.	Name and Address of Incumbrancer.	Particulars of Incumbrance, Mortgage, or otherwise.	Principal sum due.		
			£	s.	d.

5. I have not obtained from or (except by this Application) applied to the Irish Land Commission for an advance for any sum for the purchase of any land.

Sworn before me, &c.

(1) Lease, or other document of tenancy, or, if not, state in whose possession.

Jellett, K.C., and *Poole*, for the vendor :—

The question is, whether the vendors came within section 48 of the Irish Land Act, 1903. Admittedly the case does not fall within the proviso to sub-section 1, or the exception in sub-section 4. Under the Purchase Acts a landlord can either sell to the tenants under the Act of 1885, or he can sell to the Estates Commissioners under section 6 of the Act of 1903. But section 7 of the Act of 1903 can only be put in force by the Estates Commissioners, and when they deem it expedient. This is the case of the Land Judge selling direct to the tenants; and Ross, J., has held that it was not a sale within section 48, sub-section 1, and that the vendors were, therefore, not entitled to the bonus. The earliest provision for the sale of estates in the Landed Estates Court to the tenants is to be found in sections 45 and 46 of the Landlord and Tenant Act, 1870. That provision, on account of the limited nature of the advances, was but little availed of. This was followed by the purchase sections of the Land Law Act, 1881, sections 24 and 26. By section 4 of the Act of 1885, where a holding is sold by the Land Judge to the tenant, the sale may, for the purpose of advances under the Act, be regarded as a sale by a landlord to a tenant. Under section 40 of the Act of 1896 it was made obligatory on the Land Judge in certain cases to make an offer to sell to the tenant.

It is true that no steps towards a sale can be taken by the Estates Commissioners until they declare the lands an "estate"; but it is different where the lands are already in Court subject to an order for sale: *Galway's Estate* (1); *Weir's Estate* (2). *Prima facie* section 48 (1) of the Act of 1903 applies. The advance here was made in cash under that section, and out of a fund created for the first time. The case does not fall within either of the exceptions in that section. The Act of 1903 is part of the Land Purchase Code. It alters procedure; but a sale could not be carried out under its provisions without the aid of the earlier Acts. The question is not affected by section 98, unless that section controls sect. 48, which Judge Ross held that it did not: *Carroll's Estate* (3); Cherry and Maxwell Land Acts, 1903, 1904, p. 1107, note (1).

(1) [1906] 1 I. R. 137.

(2) [1908] 1 I. R. 161, 172.

(3) [1906] 1 I. R. 661, at p. 664; aff. [1907] 1 I. R. 148.

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Dudley White (with him *Serjeant O'Connor, K.C.*), for the Treasury :—

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Admitting that all sales for which public money is advanced are sales under the Land Purchase Acts, they are not all sales "under this Act," *i.e.*, the Act of 1903; for example, it could not be argued that a sale under section 40 of the Act of 1896 would be such a sale. Under section 27 all advances for the purpose of "the Land Purchase Acts" are, after the passing of the Act of 1903, to be made in cash; therefore the fact that the advance in the present case was made in cash does not help the appellant. The term "Land Purchase Acts" is a word of art; and, knowing this, the Legislature used in section 48 the words "this Act," and "The Land Purchase Acts." A zone case is a sale under "this Act," although, of course to some extent, it is a sale under "the Land Purchase Acts"; so are sales under sections 6 and 7. The bonus is given for the purpose of aiding the sale of an estate under "this Act," *i.e.*, a declared estate. *Minhear's Estate* (1). The definition section in the Act of 1903, section 98, is express. "Estate" in Part I means any lands the Estates Commissioners may declare to be regarded as a separate estate for the purposes of this Act; and in defining "Land Purchase Acts," it only includes of the Act of 1896, Part III; and in the Act of 1896, Part VI, there is a definition of Land Purchase Acts, which, by reference to the Act of 1891, includes the Act of 1885. A sale under "this Act" must be under section 1, 6, or 7. This case does not come under section 6 or 7. Does it come under section 1? No; because it is not an estate within the meaning of that section, *i.e.*, "a declared estate."

Jellett, K.C., in reply :—

"Includes" is the word used in section 98 of the Act of 1903, defining "Land Purchase Acts." The Act of 1901 is included, which amends the Act of 1891, and the definition of "Land Purchase Acts" in that Act "means," *inter alia*, the Act of 1885.

THE LORD CHANCELLOR :—

This appeal raises a question, whether a bonus is payable under section 48 of the Act of 1903, when the Land Judge, who has an estate before him for sale, sells to a tenant his holding under the provisions of section 4 of the Land Purchase Act, 1885, and an advance is made of the purchase-money by the Land Commission, as distinguished from the Estates Commissioners, and the proceeding is carried out by the Judge's direction under Form 34a of the Land Purchase Rules.

Mr. Justice Ross in this case, after the absolute order for sale was made, gave liberty to the solicitor having carriage to enter into negotiations with the tenants for the purchase of their holdings, and have proposals for purchase under Form 34a signed by the tenants. This was all done, and Judge Ross, by order of 26th March, 1907, approved of the offers, and directed the agreements to be lodged with the Irish Land Commission. The Commissioner (in this case Mr. Commissioner Lynch) sanctioned the advance, with some modifications afterwards approved of.

The purchase-moneys have been lodged in Court, and when the final schedule of incumbrances came to be adjudicated on by the Judge, a claim was made for the bonus.

The question depends on the true construction of the words in section 48, "For the purpose of aiding the sale of estates under this Act." Is the present case a sale of an estate under the Act of 1903, especially having regard to the course followed?

At the date of the passing of the Act of 1903, sales could be made to tenants, and advances for the purchase-moneys obtained—(1) by ordinary agreement between the landlord and tenant; (2) where the lands were in the Land Judge's Court, by the Land Judge selling to the tenant in pursuance of an offer—this is authorized by section 4 of the Act of 1885; (3) by sales under the 40th section of the Act of 1896.

Those modes are not affected by the Act of 1903, and the statutory provisions which authorize them are not repealed. There is a form settled for the case where the estate is in the Land Judge's Court; and Judge Ross in this case adopted the form and the practice as it had existed, which it was quite lawful for him to do.

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But when we come to the Act of 1903, there is an entirely new class of sales created, and a different tribunal to look after them, i.e., the sale of estates declared to be such by the Estates Commissioners who, though they become members of the Land Commission when appointed, are appointed under separate provisions contained in section 23, one of them being an existing member of the Land Commission; and the jurisdiction, powers, and duties of the Land Commission under sections 1-23 are directed to be performed exclusively by those three members of it.

In Part I. of the Act of 1903, where the word "estate" occurs, it is defined by section 98 as "any land which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act." To such, the provisions of section 1, the general section, and also of section 7, authorizing the purchase by the Estates Commissioners from the Land Judge, apply; and those sales are in terms sales under the Act of 1903, authorized and created for the first time under it. In sales under the Land Purchase Acts, before 1903, the advances were by Guaranteed Stock; but section 27 of the Act of 1903 provides that advances in all cases of agreements after the Act shall be by cash, and section 45 contains provisions in aid of that. This is "purchase-money advanced under the Land Purchase Acts." It is so expressly called in section 45.

I think under the legislation, therefore, we have sales of estates under the Act of 1903, and estates outside it, in existence, but the advances in both cases supplied by cash by virtue of sections 27 and 45 of the Act of 1903.

The practice of the Court with which Judge Ross was familiar, and the forms settled for use, all support this view.

Form 34a, which is the one used in this case, is substantially that in use before the Act of 1903, cash being applied for, instead of Guaranteed Stock, and this agreement does not go before the Estates Commissioners at all, nor is there any "estate" declared. It is referred to one of the Land Commissioners—in this case Mr. Commissioner Lynch—who carries the sale through.

But an agreement under section 1 of the Act of 1903 is exclusively dealt with by the "Estates Commissioners," and

they declare the lands an "Estate" under section 98, which is a condition precedent to the exercise of their jurisdiction to the extent laid down by us in *Weir's Estate* (1). The form used in such case is different. It is addressed to the Estates Commissioners, and contemplates the declaration of an estate. A sale to the Estates Commissioners, under section 7 of the Act, by the Land Judge is, of course, a sale under the Act, and it is admitted that this *primâ facie* attracts the bonus under section 48.

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Bearing all this in mind, we have to construe section 48 in this case—"aiding the sale of estates under this Act." I think that must mean sale of estates under the machinery set up by the Act of 1903, and of estates declared to be such. "Purchase-money advanced under the Land Purchase Acts" is perfectly correct language, having regard to section 27; and the proviso has in every part application to the interpretation which I give to it, and sub-sect. 4 is a limitation on the sales by the Land Judge, which otherwise might be within section 1.

It was plausibly argued—and the contention for a time found weight with myself—that the words "sale of estates under this Act" might be read sale under this code, bringing in all the Acts incorporated, which would include section 31 of the Act of 1896, and perhaps the Act of 1885; but against that we must give effect to the plain words, "under this Act" when we see the practice and machinery employed.

By the 8th section of the Act of 1903, the Estates Commissioners are authorized to purchase any untenanted land which they consider necessary for the purpose of facilitating the re-sale or re-distribution of estates purchased or proposed to be purchased. The words are "untenanted land," which raised a question whether it could be deemed an estate for bonus purposes; and, accordingly, section 1 of the Act of 1904 enacts that "any land, wholly or partly untenanted, sold to the Land Commission" (the Estates Commissioners) "may be regarded as an 'Estate' for the purpose of the payment of any percentage under section 48 of the Irish Land Act, 1903." I read that as a legislative declaration that "Estate" in section 48 means an estate declared to be such by the Estates Commissioners.

(1) [1908] 1 I. R. 172.

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However that may be, I think the decision of Mr. Justice Ross, on the facts before him, and the practice followed, was right.

I express no definite opinion as to whether it was possible for the Land Judge to have sold a holding to a tenant in a manner which would bring the case within section 1 of the Act of 1903, as such a case may hereafter arise.

In the present case he has adopted a practice lawful, usual, and, we are told, having advantages attached to it; and he has used forms applicable to that practice. The declaration of an estate was not contemplated by him, or the form, and the tribunal was not one having jurisdiction to declare it; and, therefore, I think that section 48 does not apply, and the order of Judge Ross, which recites as its foundation the ground that the sale in this matter was not the sale of an estate within the meaning of section 48, was perfectly right.

FITZ GIBBON, L.J. :—

The question which we have to determine ought to depend upon the construction of the Act of 1903, section 48. But I must admit that my judgment has been influenced by the mode in which the Land Commission and the Land Judge have put that section into operation. I think it very doubtful whether it might not have been worked differently; but, as it has been worked, I am satisfied that we can not declare the "*bonus*" to be payable on the sale of "Boyle's Estate."

Lord Justice Holmes, in the judgment which he is about to read, and in which I concur, will give a summary of the practice, and of the proceedings in this case, which have led me to this conclusion. Ross, J., says :—

"Mr. Jellett has argued that the bonus is payable in respect of all estates sold under the Land Purchase Acts, unless the case falls within one of the exceptions contained in sub-section 4 of section 48; and the present case not falling within any of the exceptions, the general rule applies."

Mr. Jellett repeated that contention here. But the ground of my decision is, that the sale in this case was not the sale of an "estate" under the Act of 1903, within the meaning of section 48,

and, therefore, that the bonus is not payable. I do not decide that the bonus can not be payable in respect of any sale of an estate by the Land Judge unless the case falls within one of the exceptions in section 48 (4). I reserve, until it arises, the question whether the Land Judge can, or can not, carry out a sale of lands so as to have them declared by the Estates Commissioners fit to be regarded as a separate estate for the purposes of the Act of 1903; and so as thereby to render the bonus payable upon the sale.

An exclusive jurisdiction is vested by section 23 in the Estates Commissioners as three members of the Land Commission.

Section 23 (1)—“The jurisdiction, powers, and duties of the Land Commission under the foregoing provisions of this Act shall be exercised and performed exclusively by three members of the Commission (in this Act referred to as ‘the Estates Commissioners’).”

Those three Commissioners are the only competent *quorum*—so to speak—of “the Land Commission” for the prescribed purposes.

Section 48 (1) says:—

“For the purpose of aiding the sale of *estates under this Act*, the Land Commission may in the prescribed manner . . . pay to the vendor of each estate sold . . . 12 per cent. on the amount of the purchase-money advanced under the Land Purchase Acts: Provided that where the estate is so encumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof, or where the percentage is payable in respect of an estate sold by the Land Judge, the percentage shall be added to the purchase-money, and shall not be paid to the vendor.

“This section shall not apply to any estate sold by the Land Judge where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, or any estate so circumstanced in respect of which an absolute order for sale was in force at the date of the passing of this Act, or to any estate sold by a mortgagee in possession.”

Section 98, by defining “estate” in these sections, makes the declaration of the Estates Commissioners essential to the payment of the bonus.

“(1) The expression ‘estate’ in *Part I.* of this Act means any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act”;

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“and the said expression in Part II. of this Act has the same meaning, with the substitution of the Congested Districts Board for the Estates Commissioners.”

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The Act of 1904, 4 Edw. VII, c. 34, removes any question as to the bonus being payable on the sales *to* the Congested Districts Board, but not on sales *by* that Board.

Section 1.—“Any land wholly or partially untenanted sold to the Land Commission or the Congested Districts Board may be regarded as an estate for the purpose of the payment of any percentage under section 48 of the Irish Land Act, 1903.”

Section 2.—“The percentage mentioned in the said section 48 may, subject to the enactments contained in the proviso to sub-section 1, and in sub-section 4 thereof, be paid to any vendor, *other than the Congested Districts Board*, whether such vendor is a person entitled to a beneficial interest in the land sold, or is a trustee, or other person not so entitled, and save as hereinafter provided shall be held by him on the trusts (if any) affecting the purchase-money.”

As at present advised, I see nothing to exclude the Land Judge from this section; and having regard to the definition clauses, I find it very difficult to lay down as a “general rule,” that “this Act” in section 48 (1) must be confined to the Act of 1903, so as to exclude all sales under the “Land Purchase Acts” as defined. The Act of 1904, section 4, is as follows:—

“This Act shall be construed as one with the Irish Land Act, 1903, and may be cited with *the Land Purchase Acts*, and *the said Act of 1903* shall be construed, and shall take effect from the date of its passing, *as if this Act had then formed part thereof.*”

Looking back to the various definitions of the “Land Purchase Acts” contained in the “Land Law Acts,” and to the fact that section 98 of the Act of 1903 declares that “the expression ‘the Land Purchase Acts’ includes Part III of the Act of 1896, and the Purchase Act, 1901, and the Purchase No. 2 Act, 1901,” (which only amend previous Acts) “and Part I of this Act,” I think that there is much to be said in favour of holding that the expression “this Act,” wherever it occurs in the Act of 1903, unless the context otherwise requires, should be construed as

bringing in all "the Land Purchase Acts" as defined, and if so it is hard to hold that a sale by the Land Judge can never carry the bonus unless it is a sale within some one or more of the exceptions in section 48.

Ross, J., has said that he cannot see any reason for the bonus not being payable in other cases, and I can see none. But we find that, by the practice of the Land Commission and of the Land Judge from the passing of the Act of 1903, certain sales, of which the sale of "Boyle's Estate" was one, have been going on with the aid of advances under the Land Purchase Acts which never came before the Estates Commissioners at all, and in which, therefore, the condition precedent to getting the bonus, viz., that of having the lands declared an "estate" by them, has never been fulfilled. We are told that there are cases, even of private vendors, in which it is considered more advantageous to sell without going to the Estates Commissioners, and in which they never hear of the sale.

Under these circumstances, I must regard sales "under the Land Purchase Acts" as a *genus*, one distinct *species* of which consists of sales "under this Act" for the purpose and within the meaning of section 48 (1) of the Act of 1903. That being so, the test whether any particular sale comes within the *species*, and carries the right to bonus, is whether the lands sold have been declared a separate estate by the Estates Commissioners; that not having been done, I am of opinion that no bonus is payable in respect of the sale in this case.

HOLMES, L. J. :—

An absolute order for the sale of the lands in this matter having been duly made in the Land Judge's Court, Ross, J., by his order of the 10th December, 1906, gave liberty to the solicitor having carriage to negotiate with the tenants of the estate for the purchase of their holdings, under the provisions of the Land Purchase Acts, and to have proposals to purchase on what is known as Form No. 34a signed by them. This order resulted in the signature by sixteen tenants of proposals to purchase their respective holdings in the Form referred to, which is described in its caption as "A Proposal by a Tenant to Purchase his Holding from the Land Judges, and Application to the Irish Land Com-

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mission for an Advance for that purpose," and is in effect an offer to purchase from the Land Judges the holding for a specified sum, provided the Land Commission should make the advance applied for. The application is contained in the same document, and is in the following words: "I hereby apply to the Irish Land Commission to advance to me, pursuant to the said Acts," a specified sum, being the amount of the purchase-money, "for the purpose of such purchase, which advance is to be repaid as is by the said Acts provided."

These proposals having been submitted to Ross, J., he, by order of the 26th March, 1907, approved thereof, and directed them to be lodged in the usual manner with the Irish Land Commission, which, after due consideration, notified its willingness to advance the several sums applied for, subject to some modifications. Thereupon Mr. Justice Ross, by order of the 1st June, 1908, accepted the proposals similarly modified, and declared the tenants purchasers of their respective holdings for the sums agreed to in the case of each. Accordingly, the aggregate of these sums has been, or will be, lodged to the credit of *Boyle's Estate*; and the final schedule of incumbrances thereon having come before the Land Judge for adjudication, a claim was made on the hearing thereof that the percentage of 12 per cent. on the amount of the purchase-money advanced under the Land Purchase Acts (commonly called the bonus) was payable by the Land Commission. This question having been argued by counsel on behalf of the owner and the Treasury, respectively, the result was the order appealed from, which declares that the Court, being of opinion that the sale in this matter was not the sale of an estate within the meaning of section 48 (1) of the Irish Land Law Act, 1903, the percentage aforesaid is not payable.

The controversy turns on what is meant by the word "estates" in the opening clause of section 48—"For the purpose of aiding the sale of estates under this Act."

Section 98 enacts that the expression "estate" in Part I. of the Act means any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of the Act. Does this definition apply to the word "estates" in the clause I have read? If so, the appeal must be disallowed; and

that it is so seems to me to be too clear for argument. A leading feature of the Act of 1903 is the creation of a body called "The Estates Commissioners." This body is to consist of three members of the Land Commission, to be nominated in a prescribed manner; and to it is given, by the 23rd section, exclusive jurisdiction to carry out all the previous provisions of the Act.

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It will be found on examination that these provisions either relate entirely to, or are mainly connected with, the sale of an estate. The expression "in the case of the sale of an estate" introduces section after section, and all the powers and duties of the Estates Commissioners thereunder relate, and are ancillary, to sales of this character. This is what distinguishes the Act of 1903 from the previous Land Purchase Acts. The object of the latter is to encourage and assist the purchase by a tenant of his holding from his landlord. They, no doubt, contain provisions such as section 26 of the Act of 1881, and section 5 of the Act of 1885, enabling the Land Commission to purchase estates for the purpose of re-selling to the tenants of the lands comprised therein their respective holdings, or such as section 40 of the Act of 1896, providing the machinery by which the Land Judge, where an estate in his Court is insolvent, may offer to sell every holding thereon to its tenant; but these are exceptional provisions in statutes which, taken as a whole, deal with the sale, not of estates but of the holding of any tenant who agrees to buy from his landlord.

If the view I have presented is correct, it follows that sales under the Irish Land Purchase Acts may now be divided into two classes. One class consists of sales to which some of the provisions contained in, and powers conferred by, sections 1-23 of the Act of 1903 apply, which, up to the payment of the purchase-money are carried out exclusively by the Estates Commissioners, and the first step in which, after the agreements for sale have been signed, is a declaration by that body that the lands which are the subject of the agreements are fit to be regarded as a separate estate for the purposes of the Act. The other class consists of sales of holdings carried out up to the payment of the purchase-money in the same mode of procedure as was in use prior to 1903.

The result of inquiries which we thought it expedient to

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make into the practice of the Land Judge's Court and of the Land Commission since the statute of that year became law, has been to show that the distinction between the two classes of sales has been clearly recognized. Separate forms are prescribed for each class, the essential difference between them being that in the one case there is not only an application to the Land Commission for an advance of the sums required to carry out the agreements to purchase, but also an application to the Estates Commissioners to declare the lands agreed to be purchased a separate estate; while in the other there is no such application as that last mentioned. Our inquiries further show that, although the great bulk of land purchase now proceeding in Ireland belongs to the first class, cases within the other are far from unusual. We have been told that landlords, especially where their property is small and in the hands of few tenants, occasionally prefer, for the sake of expedition, or for some other reason, to proceed in the old way, even when they might obtain a declaration that the lands were fit to be regarded as a separate estate; and, of course, there are many instances of sales of holdings in which the circumstances negative the possibility of such a declaration. We have further ascertained that where the Land Judge has, since 1903, accepted the proposals of the tenants of a property in his Court to purchase their holdings with money to be obtained from the Land Commission, he has followed the former practice.

I began my observations by stating the several steps taken in this case for the sale to the tenants previous to the lodgment of the purchase-money; and the procedure was substantially identical with what it would have been in the case of a similar sale by the Land Judge before 1903. I am therefore satisfied that it was not a sale of an estate under that Act; nor was a declaration that the lands were fit to be regarded as a separate estate for the purposes thereof ever contemplated. It is true that most of the provisions between sections 23 and 48, relating to the purchase-money and financial matters, apply to the two classes of sales; but we have in the opening words of section 48, the expression "sale of estates under this Act," which I have no doubt governs every portion of the section; and I am unable to give them any other meaning than an estate as defined by section 98. The

appellant contends that the phrase "estates sold by the Land Judge" in the two places where it occurs in this section has a different construction, and applies to such sales as the present. I could understand this proposition if the Act of 1903 contained no express enactments dealing with sales of estates by the Land Judge; but section 7 provides new and elaborate machinery to enable the Land Judge to sell, and the Estates Commissioners to buy, lands for the sale of which an absolute order has been made in his Court; and it will not be denied that the sales therein contemplated must be of estates as defined by section 98.

For these reasons, I hold that the appeal ought to be dismissed on the ground stated in the order appealed from—namely, that the sale in this matter was not a sale of an estate within the meaning of section 48 (1). In coming to this conclusion, I have not considered whether it was open to the Land Judge to adopt the procedure for selling the lands as an estate under the Act of 1903. A private landlord having tenants who agreed to purchase under the Land Purchase Act might either follow this course in the hope of having the lands declared a separate estate and of thus gaining the benefits given by that statute, or adopt the alternative method, which is said to be more simple and expeditious. It is possible that the Land Judge has a similar choice, and the incorporation of Part I of the Act of 1903 with the Land Purchase Acts, taken in connexion with the final clause of section 4 of the Land Purchase Act of 1885, is referred to in support of this view. But even if it is correct, it is clear that the Judge can take either course; and Mr. Justice Ross has, in this case, followed the practice of his Court, which was adopted after due consideration when the Act of 1903 had passed, and which is certainly legal.

As even the legal discussion of the question might suggest a doubt as to the wisdom and prudence of this practice, I have abstained from giving the matter any consideration.

Solicitors for the appellant: *Barrington & Son.*

Solicitor for the Treasury: *W. G. Towers.*

W. G.

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WHEELAN v. IRWIN.

(1909. No. 155.)

Practice—Security for costs—Residence out of jurisdiction—Plaintiff suing as administrator—R. S. C., 1891, Order XXIX., Rr. 1, 3.

A plaintiff suing as executor or administrator, if out of the jurisdiction, is subject to the same liability to give security for costs as if he was suing in his own right.

An administrator with the will annexed of an Irish testator brought an action to restrain the promoters of a Railway Company in Ireland from proceeding with a Bill in Parliament to extend the time for making the railway, and to prevent them increasing the liability of the testator's estate on a guarantee, given by him and the defendants to a Bank, to repay money advanced for the purpose of making the Parliamentary deposit required to be made in such cases. The plaintiff, who was a beneficiary under the will, resided in New York, and had no property of his own in Ireland, but there were considerable assets of the testator in Ireland unadministered.

The Court, being of opinion that the defendants had made a satisfactory affidavit of merits, made an order that the plaintiff should give security for costs, and measured the amount at £100.

APPLICATION on behalf of the defendants that the plaintiff, William T. Wheelan, who was resident in Brooklyn, New York, United States of America, might be ordered to give security for the costs of the action, of such amount, at such time, or times, and in such manner as the Chief Clerk should direct, and that in the meantime all proceedings in the action should be stayed.

The facts of the case, so far as material, were as follows :—

The plaintiff was the administrator of his father, Alexander Wheelan, of Newry in the county of Down, who died on November 16th, 1902, leaving considerable assets in Ireland. On July 28th, 1900, Alexander Wheelan had joined with the defendants, Irwin, Connor, Redmond, M'Cann, Sands, Duncan, and Fisher, in a joint and several guarantee to the Bank of Ireland to the extent of £8569 11s. 7d., to secure advances to the account of the defendants Irwin, Duncan, Sands, M'Cann, and Fisher, and that sum

had been advanced by the Bank of Ireland, for the purpose of being lodged as a Parliamentary deposit in respect of a Bill, then being promoted in Parliament by the defendants and Alexander Wheelan, to construct a railway from Newry to Keady. The deposit was made, the Bill passed, but nothing was done to make the railway. After Alexander Wheelan's death the defendants procured Acts of Parliament extending the time for making the railway, without, as it was alleged, consultation with or approval of the plaintiff as his administrator, or his family; and in the present year, 1909, they promoted another Bill to further extend the time. The plaintiff alleged that the effect of this was to tie up the Parliamentary deposit, and create further charges on it, and so increase the liability of Alexander Wheelan's estate. On May 14th, 1908, the plaintiff, as administrator with the will annexed of Alexander Wheelan, issued a writ in the Chancery Division of the High Court against the Newry, Keady, and Tynan Light Railway Company (which was the name of the Railway Company), to restrain that Company from promoting a Bill in Parliament for an extension of time. In this writ the plaintiff was described as residing at Broadway in the city of New York, a gentleman. This writ was not served till December 19th, 1908, and proceedings were afterwards discontinued. The writ in the present action was issued on February 15th, 1909, claiming an injunction to restrain the said Irwin, Connor, Redmond, M'Cann, Sands, Duncan, Fisher, and the said Railway Company, from promoting a Bill in Parliament to revive the powers granted for completing the said railway, and also for a declaration that the defendants were not entitled, without giving the plaintiff as administrator of Alexander Wheelan a full indemnity against all liability on foot of the said guarantee of July 28th, 1900, or procuring a release of the plaintiff as such administrator therefrom, to do any act whereby the liability of the estate of Alexander Wheelan in respect of such guarantee would be increased, or whereby his estate would be deprived of the benefit of a sum of £8760, 2½ per cent. Consols, purchased with a sum of money lent by the Bank of Ireland on foot of the said guarantee. In the writ the plaintiff was described as residing at Marion Street, Brooklyn, in the county of the city of New York, a builder. On March 1st,

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M. R. 1909, the defendants' solicitor served notice on the plaintiff's solicitor, Mr. Hunter Moore of Newry, requiring the plaintiff to give security for payment of the defendants' costs. This notice not having been complied with, the present application was made on March 3rd, 1909. An affidavit in support of the motion was made by the defendant Connor, stating that the defendants had a good defence to the action on the merits, and alleging that it had been arranged between all the guarantors, including the testator, that the guarantee was to be a continuing guarantee until the necessary funds were raised to make the said railway, or unless or until the Bank of Ireland should require payment of the said amount, and other facts which it is not necessary to state in detail. It appeared that the plaintiff had no property of his own in Ireland, but that Alexander Wheelan had bequeathed all his personal property to his four sons (of whom the plaintiff was one) subject to payment of debts and one legacy of £100, and that he had also bequeathed to them the bulk of his freehold property, and that his net personal estate in Ireland was estimated for estate duty purposes at £9944 8s. 4d., and his freehold and leasehold property in Ireland estimated for like purposes at £9247. It was alleged that his estate could not be administered till his youngest son attained age, and until the questions as to the guarantees for the railway given by him were disposed of.

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Ronan, K.C. (*F. Redmond* with him), in support of the motion :—

This is an action to restrain the promotion of a Bill in Parliament; but a Court of Equity will not interfere in such a case: *The Lancashire & Carlisle Railway Co. v. The North-Western Railway Co.* (1). The defendants have a good defence on the merits, and inasmuch as the plaintiff is resident abroad and has no property in this country, he should be ordered to give security for costs. The fact that the plaintiff sues as administrator makes no difference: he is subject to the same liability with regard to security for costs as if he were suing in his own right: *Chevalier*

v. Finnis (1); *Chamberlain v. Chamberlain* (2); *Sykes v. Sykes* (3);
Shaw v. Dempsey (4).

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Matheson, K.C., for the plaintiff:—

The plaintiff wishes to prevent the defendants charging the estate of the deceased with further expense. The defence is a sham one; but in any case the testator has left a large estate in Ireland, and in such a case the Court will not require security: *In re Apollinaris Company's Trade Marks* (5). If the action is eventually dismissed with costs, judgment should be given against the plaintiff as administrator, and there are plenty of assets in this country to satisfy such a judgment. The Parliamentary deposit is in Court, and a charging order could be got upon it. [He also referred to *Duffy v. Joyce* (6); *Crawford v. Irwin* (7); *Sacker v. Bessler* (8).]

Ronan, K.C., in reply:—

At law, previous to 3 & 4 Wm. 4, c. 42, s. 31 (Eng.), and 3 & 4 Viet. c. 105, s. 56 (Ir.), a plaintiff executor, if the verdict was for defendant or in case of nonsuit, was not liable for any costs, unless the action was such as he might have brought in his personal capacity: *Tidd's Practice* (5th ed.), p. 964; but by these statutes he was liable to pay costs in such cases, as if he were suing in his own right, unless the Court or a Judge otherwise ordered. These provisions were superseded by R. S. C., Order LXV., R. 1, which adopted the rule of the Court of Chancery as to costs. This action may or not have been properly brought; but the plaintiff cannot be entitled as of right to his costs out of the assets of the testator. The Court of Chancery never makes an order that costs of a defendant are to be paid by a plaintiff executor out of the assets of the testator, or, if not, out of the plaintiff's own goods. If the plaintiff cannot resort to the assets, there is no property available to pay the defendants' costs, and, therefore,

(1) 1 Br. & B. 277.

(2) 1 Dowl. 366.

(3) L. R. 4 C. P. 648.

(4) Sau. & Sc. 628.

(5) [1891] 1 Ch. 1.

(6) 25 L. R. Ir. 42.

(7) 1 New Ir. Jur. 64.

(8) 4 T. L. R. 17.

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security should be ordered. [He referred to *Pooley v. Whetham* (1) and Wylie's Judicature Acts, Order XXIX., R. 1, p. 463, note.]

THE MASTER OF THE ROLLS:—

It is clearly settled that if a plaintiff be permanently resident out of the jurisdiction, whether peer or pauper, suing for himself or in a representative capacity, the Court, if it sees that there is a real question to be tried, and that the defendant is not entering a sham defence, has power to order the plaintiff to give security for the costs of the action. The practice in Ireland, in the Chancery Division at all events, has been consistent with the practice in England. In *In re Apollinaris Company's Trade Marks* (2), Lord Halsbury, dealing with an application for security for the costs of an appeal by the Vichy Company, which was a foreign company, says (p. 3): "There is no such hard and fast rule as has been suggested, that because a person is resident abroad he must necessarily give security for costs. His being so resident makes a *prima facie* case for requiring him to give security, but it is subject to a well-known and ordinary exception that if there are goods and chattels of his in this country, which are sufficient to answer the possible claim of the other litigant, and would be available to execution, the Courts will not order him to give security for costs." The Court of Appeal in that case held that security should not be ordered, as the Vichy Company had goods in England capable of answering any possible costs of the appeal.

There is another case on the subject, *Ebrard v. Gassier* (3): there no order for security for costs was made by the Court of Appeal; but there was a difference of opinion between the Vice-Chancellor of the County Palatine of Lancaster and the Court of Appeal, as to whether the plaintiffs had property in England available for execution, and this is of importance, having regard to the view I take in the present case. The action was brought in the Palatine Court, by a firm in America against a firm in Manchester. The defendants put in a defence and counterclaim, and applied to the Vice-Chancellor for an order upon the plaintiff

(1) 28 Ch. D. 43.

(2) [1891] 1 Ch. 1.

(3) 28 Ch. D. 232.

to give security for costs. The plaintiffs filed an affidavit, stating that they, with other persons, carried on business at Manchester, and that the firm had then assets amounting to £2000. The Vice-Chancellor refused the application. On the appeal the plaintiffs produced an affidavit stating that since the order one of the plaintiffs had come to Manchester for the purpose of carrying on the action. The Court of Appeal held that the affidavit as to the property of the plaintiffs in England was ambiguous, and was not sufficient to support the order of the Vice-Chancellor; but they held that, as one of the plaintiffs had come to England since the order was made, although for a temporary purpose, the defendants were not entitled to security for costs. Bowen, L.J., there says, at p. 235:—"The plaintiffs being abroad were *prima facie* bound to give security for costs, and if they desired to escape from so doing they were bound to show that they had substantial property in this country, not of a floating, but of a fixed and permanent, nature, which would be available in the event of the defendants being entitled to the costs of the action."

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All the cases in the Chancery Division on this subject which I can recollect were cases in which the plaintiffs rebutted the *prima facie* obligation to give security by showing that they had assets within the jurisdiction available in the event of their being defeated. This is plain; if the plaintiff in this action is suing personally, beyond all doubt he is bound to give security for costs in this action. If he says that he comes in a representative capacity, he is equally bound to give security for costs, unless he proves that there are assets of his testator which the defendant can render available for costs, in the event of the Court awarding costs to the defendant.

It appears from the affidavit of the defendant Connor, that prior to the commencement of this action, namely, on May 14th, 1908, the plaintiff issued a writ against the defendant Company, which was served on the defendant Connor, as secretary, in December, 1908, claiming similar relief to that sought in this action, and in that writ the plaintiff was described as resident "at Broadway in the City of New York, a gentleman"; but that action was afterwards discontinued. In the writ in the present

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action the plaintiff is described as resident in Marion Street, Brooklyn, in the County of the City of New York, and is stated to be a builder. Mr. Hunter Moore, solicitor for the plaintiff, has made an affidavit in reply to Mr. Connor's, and says that the plaintiff changed his residence during the nine months between May 14th, 1908, and February 16th, 1909, the date of the issue of the present writ, and that any documents for the plaintiff can be served on him, Mr. Moore. Mr. Moore says that the plaintiff sues as administrator of the late Alexander Wheelan of Newry, who was an extensive builder and property owner; that the deceased left considerable personal estate, which was estimated at £9944 8s. 4d. for estate duty purposes, besides freehold and leasehold property, estimated at £9247 for estate duty purposes; and he submits that these assets, and not the plaintiff personally, would be liable for any costs awarded to the defendants. How can I anticipate the decision of a Court or a Judge as to the costs incurred by an unsuccessful and migratory litigant? The net result is that the plaintiff has failed to prove that he has any property in this country which could be made available for payment of costs, if awarded against him. His counsel went so far as to say that he had an interest in the sum of £8569 11s. 7d. advanced by the Bank of Ireland for the purpose of a Parliamentary deposit. The plaintiff must give security. Has he any higher rights in his representative capacity? He says that the unadministered assets of his father can be realized. There is no doubt that the Court of Chancery can give an executor or administrator the costs of an action brought by him for the benefit of the estate. I might, if I had been asked to administer the estate of Alexander Wheelan, have ordered that the plaintiff should have the costs of an action such as the present out of the estate. The administrator here is resident abroad, and has brought this action in the Chancery Division, and has failed to prove that the defence set up by the defendants is a sham defence. It is impossible for him to say that whatever happens to the action, these assets of his father may be made available. I shall measure the security at £100.

Solicitor for the plaintiff: *Hunter Moore.*

Solicitors for defendants: *Robert A. Mullan & Son.*

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF THE DELVIN RURAL DISTRICT LABOURERS ORDER, 1906.

Land Judge's Court.
Madden, J.
1909.

Local Government Board—Labourers Acts—Arbitrator—Award—Compulsory taking of lands—Compensation over £60—Registration of title—Receipts for sums under £60—Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37), s. 11.

May 17.
June 18.

Lands were compulsorily taken for the purposes of an improvement scheme under the Labourers Acts, and the arbitrator of the Local Government Board awarded to the owner three sums of £38, £36, and £33, in respect of three parcels of land, held by the owner under the same title. The owner gave to the Rural District Council three several receipts purporting to be pursuant to section 11 (4) of the Labourers (Ireland) Act, 1906. The Rural District Council having, pursuant to the provisions of section 21 of the said Act, transmitted the receipts to the registering authority, under the Local Registration of Title Act, 1891, the Registrar of Titles declined to receive the receipts as evidence of title, on the ground that section 11 of the Labourers (Ireland) Act did not apply. On appeal to the High Court:—

Held (affirming the decision of the Registrar of Titles), that, inasmuch as the purchase-money payable to the owner for his interest in the land acquired exceeded £60, section 11 of the Labourers (Ireland) Act, 1906, which makes receipts given pursuant to its provisions effectual to vest title, did not apply.

APPEAL from the order of the Registrar of Titles. The Delvin Rural District Council compulsorily acquired under the provisions of the Labourers (Ireland) Acts, 1883 to 1906, three plots of land portion of Francis V. Chapman's estate. The three plots were comprised in the one award by the arbitrator, who awarded to the owner sums of £38, £36, and £33, respectively, for the three plots of land.

The Council purporting to act under section 11 of the Labourers (Ireland) Act, 1906, drew up separate receipts for the three sums, each of which receipts was signed by the owner.

Madden, J. The receipts were in the following form :—

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In re
DELVIN
R. D. C.
LABOURERS
ORDER.

DELVIN R. D. C.

Receipt for Purchase-money,
dated 21st April, 1908.

I, Francis Chapman, of South Hill, Delvin, in the County of Westmeath, being the owner of the lands hereinafter mentioned, do hereby acknowledge that I have received from the Delvin Rural District Council (hereinafter referred to as "the Council") the sum of £33, as the purchase-money of, or compensation for, all my estate, right, title, and interest in and to All that and those that parcel of land in the townland of Robinstown Great, in the electoral division of Rosmead, in the Delvin Rural District and county of Westmeath, containing 1 acre and 25 perches statute measure, or thereabouts, authorized to be acquired by the Council under the provisions of the Labourers (Ireland) Acts, 1883 to 1906, and distinguished in the schedule to said Order, and on the maps and plans deposited by the Council, pursuant to said Acts, by the number 103 on Ordnance Sheet 9, county of Westmeath.

Dated the 21st day of April, 1908.

FRANCIS CHAPMAN.

These receipts, having been lodged for registration by the Rural District Council, the Registrar of Titles made the following order, dated 9th November, 1908 :—

Whereas a receipt for the sum of £33, compensation awarded to Francis V. Chapman, in respect of his ownership of certain lands purchased by the Delvin Rural District Council in pursuance of a scheme under the Labourers Acts, has been lodged in this office on behalf of the said Council by Messrs. Thomas Tighe Meeredy & Son, solicitors, and application has been made for the registration of same, pursuant to the provisions of section 11 of the Labourers (Ireland) Act, 1906. And whereas it appears that compensation, exceeding in the aggregate the sum of £60, was awarded to the said Francis V. Chapman, in respect of his ownership of these and other lands comprised in the said scheme; and it has not been shown that all the said lands were held by him otherwise than under the same title; and the Registrar being of opinion that the said section 11 does not apply to the case, It is hereby ordered that the said application be and the same is hereby refused.

The Rural District Council served notice of appeal on the ground that the receipt above referred to was effectual under

section 11 of the Labourers (Ireland) Act, 1906, to vest absolutely in the Rural District Council the fee-simple of the land in respect of which the compensation set out in said receipt was fixed.

Madden, J.
1909.

In re
DELVIN
R. D. C.
LABOURERS
ORDER.

George Green, K.C., and *Charles Dromgoole*, for the Local Government Board for Ireland :—

The word “land,” not “lands,” is used in section 11 (1) of the Labourers Act, 1906. Each individual plot is intended to be dealt with separately. Different questions, and different matters in dispute, might arise in the case of the different plots. The object of the first six sub-sections of section 11 is to give good title in the cheapest and most expeditious manner. The case of *In re Abbeyleigh Rural District Council and White* (1) dealt with a different point. It is admitted that the compensation here, being over £60, must be held by Chapman in trust for the persons entitled. This is so because there are no words in the sub-section entitling him to retain it for his own use and benefit, and under the Settled Land Acts a limited owner receiving a sum in excess of £60 would be a trustee for all parties. *Ex parte Birch* (2) deals with an enabling Act, and enlarged the right of appeal. The words of the section on which that case turned are “the amount of the price or compensation,” which words are not in section 11 of the Labourers Act. The words giving the right to appeal are “enabling provisions,” and are always construed as widely as possible.

Dudley White, in support of the order of the Registrar of Titles :—

The order made is correct, as, once the compensation, whether for several plots or not, exceeds £60, the provisions of section 11 do not apply : *In re Abbeyleigh Rural District Council and White* (1). The total amount of compensation awarded by the arbitrator is “the purchase-money or compensation payable” under section 11 of the Labourers Act. The decision of the Court of Queen’s Bench in *Birch’s Case* (2) is applicable.

Dromgoole, in reply.

(1) [1909] 1 I. R. 212.

(2) [1894] 2 I. R. 181.

Madden, J. MADDEN, J. :—

1909.

In re
DELVIN
R. D. C.
LABOURERS
ORDER.

June 18.

The question which arises in this case depends on the construction of section 11 of the Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37). This Act is to be construed as one with the Labourers (Ireland) Acts, 1883 to 1903, and the intention of the Act was to simplify and cheapen procedure. The second schedule of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), is adopted as part of the code for the purposes of arbitration, with the amendments contained in section 11 of the Labourers Act, 1906. The first sub-section of that section applies to cases where the purchase-money or compensation payable to a person claiming any interest in land does not exceed the sum of £60; and sub-section 9 refers to section 72 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and raises the limit in that section to £60.

The question in the case is, what is the "interest in land" which was acquired by the Rural District Council? It may mean either of two things. On the one hand, it may be the interest in each separate site considered by itself and distinct from the other sites. In that case, if the compensation for each site did not exceed £60, it would follow that the aggregate amount of the purchase-money might be paid over by the Council, under the first sub-section. Or, on the other hand, it may mean the interest in all the land acquired and held under the same title. The award here deals with land the entire of which is held under the same title. It is conversant with the estate and interest of Francis V. Chapman and of no other person.

The question as to which of these two views is the correct view depends on the purview and object of the statute. This was the principle of the decision of the Court of Queen's Bench in *In re Housing of the Working Classes Act, 1890*; *Ex parte Birch* (1). That case arose under article 26 of the second schedule to the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), with reference to the right of appeal, when the compensation awarded exceeded £1000. The ground of the decision is stated by Holmes, J., at page 187 of the report. He says: "The schedule that comes before the arbitrator is prepared by the local

(1) [1894] 2 I. R. 181.

authority ; and it is not unusual to divide into several lots lands held by the same person, for the same estate, and under the same title. There are often reasons of convenience and expediency for the course ; but I can find nothing in the statute which makes the right of appeal depend upon whether the amount awarded to a person in respect of his estate or interest consists of a single sum or the aggregate of several sums. Here Mr. Birch is said, on the face of the award, to have an estate in fee-simple in certain premises indicated by reference to numbers on a map. Five sums of money are awarded to him for this estate ; and whether the arbitrator adds them together or not, the total of these sums is the compensation payable to him."

Madden, J.
1909.

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ORDER.

The intention of the Legislature was to give an appeal when the sum at stake exceeded £1000 ; and the Court held that this intention, clearly deducible from the statute, could not be defeated by splitting up the award into sums each of which did not exceed £1000. I agree with the view expressed by Mr. Bolton in his valuable book on the Labourers Acts, that the principle of this decision applies to the present case. The exceptional legislation in the Act before us is limited to an interest in land of a value not exceeding £60. The purchase-money of the interest in land acquired in the present case exceeds this amount. No doubt it is composed of several items, each of which is less than £60. But the total of these sums is the amount payable to the owner of the land, and this is the test to be applied.

I was referred to a recent decision of the Master of the Rolls, in the case of *In re Abbeyleix Rural District Council and White* (1). The facts before him were not the same as those of the present case. But I am fortified in the opinion which I have formed by his decision, which is plainly founded upon the construction of the statute which I have adopted.

As the purchase-money payable to the owner for the interest in the land acquired exceeded £60, I am of opinion that the Registrar was right in holding that section 11 did not apply.

Solicitors for the Local Government Board for Ireland :

T. T. Mecredy & Son.

Solicitor for the Registrar of Titles : *W. G. Towers.*

D. M. S.

Wylie, J. IN THE MATTER OF THE PROCEEDS OF THE SALE
1909. OF THE HOLDING OF RICHARD ROULSTON.

July 15, 27.

*Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 54 (3)—
Holding subject to land purchase annuity—Restriction on mortgaging—
Mortgage in excess of limit—Arrears of interest—Judgment mortgage.*

Section 54, sub-section 3, of the Irish Land Act, 1903, only extends to a mortgage or charge by the voluntary act of the proprietor, and does not invalidate a judgment mortgage, no matter what the amount of the prior charges on the holding may be.

Semle: The limit imposed by the sub-section applies only to capital charges; and when the interest on a capital charge which exceeds the limit has fallen into arrear, there is nothing in the sub-section to invalidate the claim for interest on the limited amount of principal.

Restrictions on alienation and charging by evicted tenant-purchasers discussed.

QUESTIONS ARISING ON ALLOCATION.

On the 4th October, 1906, two advances of £442 and £489 respectively were made to William Parker, as tenant-purchaser of two holdings under the Land Purchase Acts. Prior to the 14th November, 1906, these holdings became vested in Richard Roulston, subject respectively to purchase annuities of £14 7s. 4d. and £15 7s. 10d. He had made default in payment of the annuities, and the Land Commission had sold his interest in the holdings. The surplus moneys available for allocation, after discharging the claim of the Land Commission, amounted to £809 12s. 3d. The first item appearing on the schedule was a claim for £441 19s. 1d. for principal, and two years' arrears of interest on foot of a mortgage dated the 14th November, 1906, and registered on the 22nd March, 1907, whereby Richard Roulston charged the holdings with a sum of £400 and interest. In respect of this claim the examiner had only vouched for payment the sum of £302 11s. 8d., being equivalent to ten times the amount of the purchase annuities, and had refused to vouch any sum in respect of interest, on the ground that any sum so allowed

would increase the amount payable on foot of the mortgage to more than ten times the amount of the purchase annuities. *Wylie, J.*
1909.

The next items on the schedule were six judgment mortgages, registered against the interest of Richard Roulston in the holdings. The earliest of these was registered on the 28th December, 1907, and the latest on the 22nd January, 1908. The only remaining claim appearing at No. 8 was on foot of a deed of charge, registered on the 23rd February, 1908, whereby Richard Roulston purported to charge the said holdings with the sum of £46 13s., together with interest at 4 per cent. *In re*
ROULSTON.

The aggregate of the sums so charged was in excess of the entire net proceeds of sale.

The questions that arose were—

1. Whether the claimant at No. 1 on the schedule was entitled to interest, in addition to a sum on foot of principal calculated at ten times the amount of the purchase annuities? and—

2. Whether—(a) the judgment mortgages, and (b) the deed of charge, appearing at No. 8, were invalid, having regard to the provisions of section 54 of the Irish Land Act, 1903?

R. E. Osborne, for the solicitors having carriage :—

With regard to question 1, the provisions of section 54 (3) of the Act of 1903 are in restraint of a common law right, and, unless perfectly clear, should not be construed against the tenant purchaser. If interest is in arrear, the mortgagee is entitled to be paid the arrears of interest in addition to the principal, although in the aggregate the two sums may amount to more than ten times the purchase annuities.

As to question 2; section 54 (3) does not apply to judgment mortgages. Under section 10 of Deasy's Act it has been held that suffering the registration of a judgment mortgage is not a breach of a covenant against alienation. "Mortgage" in the sub-section implies a voluntary act by the proprietor. A judgment mortgage is created *in invitum*. The words "instrument of mortgage" clearly refer to an instrument executed by the proprietor. The provision in sub-section 4, that every such

Wylie, J. instrument must be registered within three months, shows that
 1909. a judgment mortgage is not contemplated by the sub-section, as
In re a judgment only becomes a mortgage on registration.
 ROULSTON.

July 27.

WYLIE, J. :—

In this case I have to allocate the purchase-money of two holdings sold by the Land Commission for default in payment of the purchase annuities charged on the holdings.

It appears that on the 4th October, 1906, two advances of £442 and £489 respectively were made to one William Parker, as the tenant-purchaser of two holdings, and, some time prior to the 14th November, 1906, these holdings became vested in Richard Roulston, subject to the purchase annuities of £14 7s. 4d. and £15 17s. 10d. respectively. Roulston having failed to pay the purchase annuities, the holdings were sold by the Land Commission, and the net proceeds of the two holdings, after deducting the costs and expenses of sale and the arrears of annuities, amounted to £809 12s. 3d. By section 55 of the Act of 1903, in case of a sale by the Land Commission, the holding is sold subject to the purchase annuity, but discharged of all other claims and incumbrances; and all such claims attach to the purchase-money in like manner as, immediately before the sale, they attached to the holding.

By a deed of mortgage dated the 14th November, 1906, Roulston charged the two holdings with a sum of £400; and subsequently six judgment mortgages were registered against the holdings, followed by a further deed of charge for £46 13s., the aggregate of the sums so charged being in excess of the entire net proceeds of sale.

Questions have been raised as to how the funds are to be allocated, having regard to the provisions of section 54, sub-sect. 3, of the Act of 1903, by which the proprietor of a holding, subject to a purchase annuity, is prohibited from charging the holding with sums exceeding ten times the amount of the purchase annuity. Now the purchase annuities on the two holdings amount together to £30 5s. 2d., and the first mortgage being for £400, is in excess of ten times the purchase annuities by a sum of £97 8s. 4d.

It is quite clear upon the terms of the section, and the mortgagee so admits, that to the extent of such excess the mortgage is void.

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ROULSTON.

But a further question is raised as to interest. There is due on the mortgage £441 19s. 1d. for principal and interest, and the Examiner appears to have vouched for payment only £302 11s. 8d. *i.e.* ten times the purchase annuities, on the ground, I presume, that the statutory limit prescribed by the section includes interest as well as principal. This point has not been argued, and, if the parties interested wish to argue it, I shall give them an opportunity. But as at present advised, I do not think that is the meaning of the section. I think the limit was intended to apply only to the capital charges, the interest being assumed to be paid out of annual income; and, if it should fall into arrear, I do not think there is anything in the section to invalidate the claim for interest on the limited amount of principal.

The next question is, whether the first charge, having exceeded the limit, all or any of the subsequent charges are void. It is suggested that any charge that by itself does not exceed the limit is good, no matter what other charges already exist. If this were so, any proprietor could in one day, by a series of charges, each within the limit, mortgage the holding to its full value, and thereby defeat the whole object of the section, and reduce it to a nullity. I have no doubt at all that if all the subsequent charges in this case had been by deed of charge, they would be all void, and the only question is, whether the section applies to a judgment mortgage. If it does not, the whole apparent object of the section can be defeated by any proprietor borrowing money to any extent, allowing judgment to be entered by default and registered as a judgment mortgage against his holding. Still this is the ordinary right and remedy of every creditor against his debtor and his debtor's property, and nothing but a clear statutory provision could prevent him exercising it. Reading sub-sections 3 and 4 of section 54 together, it seems to me impossible to extend them to a judgment mortgage. They appear to me only to affect an instrument of mortgage, a charge executed by the proprietor of the holding. And if we look at section 11 of the Evicted Tenants Act, 1907, which is to be read with the Act of 1903, I think the

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intention of the Legislature is made more clear. There can be no doubt that section 54, sub-section 3, prohibiting a charge beyond a certain limit, applies to an evicted tenant-purchaser as well as any other tenant-purchaser, but in the case of an evicted tenant-purchaser further limitations are imposed by section 11 of the Evicted Tenants Act. Sub-section 1 provides that, so long as a parcel of land, sold to an evicted tenant, is subject to a purchase annuity, the interest of the purchaser shall not be transferred on a voluntary sale without the consent of the Land Commission; and sub-sect. 2 provides that no parcel of land purchased by an evicted tenant shall be made available in any bankruptcy, or by any other process or proceeding of law to pay, satisfy, or discharge, in whole or in part, any debt contracted by the evicted tenant prior to the vesting of the land. The first sub-section absolutely prohibits assignment by voluntary act without consent; the second prohibits a creditor from enforcing his debt against the land, where the debt was contracted prior to the vesting, but does not affect the ordinary rights of a creditor against the land in case of a debt contracted after the date of vesting.

It seems to me, therefore, that the position of an evicted tenant-purchaser under the two Acts combined is this—(1) His interest cannot be transferred by a *voluntary sale* without consent; (2) his interest cannot be charged beyond a certain limit by his *voluntary act*, without consent; (3) his interest cannot be affected or incumbered by any creditor for a debt contracted *prior* to the date of vesting the land, but may be charged and sold for any future debt irrespective of the limit of charge prescribed by section 54, sub-section 3, of the Act of 1903.

In my opinion, therefore, section 54, sub-section 3, only extends to a mortgage or charge by the voluntary act of the proprietor, and does not invalidate a judgment mortgage, no matter what the amount of the prior charges on the holding may be. Hence the curious and absurd result follows from this benevolent attempt of Parliament to protect a tenant-purchaser from himself, that a mortgagee by deed, who advances his money beyond the limit prescribed by the Act, must lose the excess, while a judgment mortgagee, who may subsequently advance money upon the security of the same lands, but charged by a different method,

though it may be in substance as voluntary a charge as the other, can claim payment of his charge in full.

My duty, however, is to administer the Act as I find it; and I must, therefore, hold that the first mortgagee can only be paid part of his claim, viz., £302 11s. 8d., with such interest thereon as may be due; that the *puisne* judgment mortgagees are entitled to be paid in full; and that the *puisne* mortgage by deed, at No. 8 on the schedule, is void.

Wylie, J.
1909.

In re
ROULSTON.

Solicitors having carriage: *Wilson & Elliott.*

J. E. W.

IN RE ADAIR AND SETTLED LAND ACT.

(1909, No. 641.)

Wylie, J.
(for Barton, J.)
1909.

July 2, 9.

Settled land—Tenant for life—Forfeiture for non-residence—Military service—“Refuse or neglect” to reside—Sale under Settled Land Act, 1882 (45 & 46 Vict. c. 38).

In a settlement it was provided that every person who should become actually entitled as tenant for life to the possession or receipt of the rent and profits of the lands should, for a period of six months (but not necessarily consecutively) in each year, dwell and reside in, and at all times keep in good and suitable order and condition, the mansion house, as the family residence of such person; and that if the person so entitled should at any time refuse or neglect to dwell and reside as aforesaid in, or keep in good and suitable order and condition, the said residence, the limitations therein contained to the use of such person as tenant for life should absolutely determine and become void. The tenant for life was in the Royal Marines, on the active service list, and liable to be called upon to serve abroad. It was proposed to sell portion of the lands to the tenants, under the Land Purchase Acts:—

Held, that the tenant for life was entitled to exercise the power of sale given by the Settled Land Act, 1882, without risk of forfeiture.

Held, also, that the residence required by the condition was personal residence; but that absence from home on military or naval duty would not amount to a refusal or neglect to reside within the meaning of the condition.

ORIGINATING SUMMONS.

Application on behalf of Major-General William Thompson

Wylie, J.
1909.

In re
ADAIR.

Adair, the tenant for life under two indentures of settlement, each dated 13th March, 1893, for an order, (1) notwithstanding the condition in the settlements mentioned, requiring the tenant for life of the lands settled to reside for six months at least in each year in the mansion house of Loughanmore as the family residence of such person, that the said Major-General William Thompson Adair, or the successive tenants for life of the said lands, are entitled to exercise the power of sale conferred by the Settled Land Acts upon the tenants for life, of all or any part of the lands and hereditaments comprised in the said settlements, without incurring the forfeiture attached to said condition; (2) that trustees for the purposes of the Settled Land Acts be appointed; (3) defining the condition of residence in the said mansion house in the case of (a) an officer in His Majesty's Army or Navy while on the active service list; (b) a tenant for life not engaged or liable to be engaged in the public service; and (4) whether, if the applicant maintains an establishment in the said residence, with the intention of residing there as required by said condition, he would forfeit his estate by failure to actually dwell therein during six months in the year, owing to absence abroad in the service of His Majesty the King. By both said settlements it was provided and declared that every person who should, under the limitations therein contained, become actually entitled as tenant for life or tenant in tail by purchase to the possession or receipt of the rent and profits of the said lands should, if of full age, for a period of six months at least (and not necessarily consecutively) in each year, dwell and reside in, and at all times keep in good and suitable order and condition, the said mansion house as the family residence of such person, and that if the person so entitled as aforesaid should at any time refuse or neglect to dwell and reside as aforesaid in, or keep in good and suitable order and condition the said residence, the limitations therein contained to the use of such person as tenant for life or tenant in tail should absolutely determine and become void. Applicant, in his affidavit, supporting the application, set out that he was a Major-General in the Royal Marines on the active service list, and as such, was liable to be called upon to serve abroad, in which case it would not be in his power to comply with the

condition of residence laid down by the settlements. He further stated that negotiations had taken place with a view of selling portion of the lands under the provisions of the Land Purchase Acts to the occupying tenants; and he desired, if it should be advantageous that such sale should be carried out, that trustees for the purposes of the Settled Land Acts should be appointed in order to enable him to carry such sales into effect.

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1909.

In re
ADAIR.

Walker, K.C., for the applicant :—

Conditions of residence similar to that contained in the settlements in this case have been held not to prevent the tenant for life exercising the power of sale conferred by the Settled Land Act: *In re Paget's Settled Estate* (1); *In re Haynes; Kemp v. Haynes* (2); *In re Trenchard; Trenchard v. Trenchard* (3). A condition which would prevent service in the naval or military forces of the Crown is against public policy: *In re Beard* (4). [Counsel also referred to *In re Moir; Warner v. Moir* (5); *Clavering v. Ellinson* (6); *In re Thompson's Will* (7); *Partridge v. Partridge* (8).]

Bates, K.C., on behalf of the infant remainderman said he would derive no benefit from any relaxation of any of the conditions imposed by the settlement, inasmuch as they tended to accelerate the determination of the prior estates, but could not affect the tenant in tail who might bar the entail. So far as the condition could restrain the discharge of naval or military duties it was inoperative. There was no objection to a declaration to this effect, but apart from this the Court could not define the extent or character of the residence which would satisfy the condition. In *Walcot v. Botfield* (9), which has not been overruled, Page-Wood, V.-C., held that personal residence was necessary.

D. M. Wilson, K.C., for the trustees of the settlements, submitted that the conditions imposed were valid and enforceable.

(1) 30 Ch. D. 161.

(2) 37 Ch. D. 306.

(3) [1902] 1 Ch. 378.

(4) [1908] 1 Ch. 383.

(5) 25 Ch. D. 605.

(6) 3 Drew. 451.

(7) 21 L. R. Ir. 109.

(8) [1894] 1 Ch. 351.

(9) Kay, 534.

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Macrory, for Admiral Adair, the next tenant for life, supported the application.

WYLIE, J.:—

By an indenture of the 13th March, 1893, after reciting that Amelia Sophia Adair, and her sister Eleanor Margaret Hunt, were presumptively entitled as co-heiresses of Thomas Benjamin Adair to the reversion in fee in certain lands, expectant upon their deaths without issue, the said Amelia Sophia Adair conveyed her moiety of said lands to trustees to the use, after life interests to herself, her said sister, and her sister's husband, James Hunt, of William Thompson Adair, eldest son of General Sir Charles Adair, and his assigns, during his life, remainder to his first and other sons in tail male, remainder to Charles Henry Adair, second son of said Sir Charles Adair, and to his first and other sons in tail male, remainders over to the other sons of Sir Charles, and their sons, in a similar manner. The said indenture contained a recital that said Amelia Sophia Adair was desirous that the residence of Loughanmore should be retained and kept up in suitable order and condition as the residence of the Adair family, and had determined to make such settlement as thereafter contained; and that, for the purpose of enabling the person for the time being entitled to the said residence to maintain and keep up same in a suitable manner as such residence, had also determined to make such settlement of her share in certain moneys charged on the lands and of all the effects in the house as thereafter mentioned. The said indenture also contained a proviso "that every person who should become entitled under the deed as tenant for life or tenant in tail by purchase to the possession or receipt of rents and profits, and being of age, should for a period of six months (not necessarily consecutive), in each year dwell and reside in, and at all times keep in good and suitable order and condition, the said mansion house of Loughanmore, as the family residence of such person; and in default his interest was to cease and determine, and the lands were to go over, as if he were dead without issue, to the next person entitled. By said indenture said Amelia Sophia Adair also transferred to the trustees her said share in the moneys charged

on the lands, and the effects in the house, upon the same trusts and conditions as attached to the lands. By another indenture of same date, the said Eleanor Margaret Hunt conveyed and transferred to the same trustees her moiety of the said lands and her share of certain moneys and effects to the same uses and subject to the same conditions as the other moiety. James Hunt died in 1894, Amelia Sophia Adair died in 1896, and Eleanor Margaret Hunt died on the 13th April, 1909, having by her will devised certain other lands to the trustees of the said second indenture of 13th March, 1893, to be held upon the same trusts and conditions as the lands in said indenture. On the death of said Eleanor Margaret Hunt, Major-General William Thompson Adair became, and he is now, entitled as tenant for life in possession under said indentures and said will, and has applied by originating summons for certain declarations as to his rights, having regard to the conditions in said deeds. The first declaration asked for is, that notwithstanding the condition as to residence, he can exercise the powers of sale conferred upon tenants for life by the Settled Land Acts, of all or any part of the settled lands, without incurring the risk of forfeiture attached to the condition.

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Now the law upon this point is well settled by a number of cases beginning with *In re Paget's Settled Estates* (1), and ending with *In re Richardson* (2), all of which agree in deciding that such a condition as this is absolutely void so far as it affects the power of the tenant for life to sell, or his right to a life interest in the proceeds in case of sale. I have, therefore, no difficulty in making a declaration in the terms asked for. But it is also decided in *In re Haynes* (3) and *In re Trenchard* (4), that such a condition, except so far as it might act as a fetter on the tenant for life exercising his powers under the Settled Land Acts, is perfectly valid and binding until sale; and, therefore, it appears to me that if the tenant for life sold the rest of the property without selling the residence, the condition as to residence would have to be complied with in order to prevent the forfeiture of his interest in the entire property.

(1) 30 Ch. D. 161.

(2) [1904] 2 Ch. 777.

(3) 37 Ch. D. 306.

(4) [1902] 1 Ch. 378.

Wylie, J.

1909.

In re
ADAIR.

The second part of the application in the summons is for the appointment of two trustees for the purpose of the Settled Land Acts. That I grant in the terms asked for.

The third part of the summons asks for a declaration defining the condition of residence in the mansion house of Loughanmore in three cases—(1) in the case of an officer of His Majesty's army or navy while on the active service list. When dealing with this question, counsel referred me to a case of *In re Beard* (1), in which Mr. Justice Swinfen-Eady held that a clause in a will divesting a devise, "if the devisee entered into the naval or military services of the country," was void as against public policy, and that the devisee was absolutely entitled, free from such condition.

Now, if the condition as to residence in this deed can only be construed to mean that each tenant for life, or tenant in tail, must in order to comply with it retire from active service as a military officer, and never during his life re-enter it, I think the principle of the above decision in *Beard's Case* (1) would apply, and that the condition would be void. But must the condition be construed to mean any such thing? The condition is a condition subsequent, divesting the estate and passing it over to some one else on the happening of certain events. If the events do not happen, the estate remains vested and does not pass over. The events are that if the tenant for life entitled to possession shall at any time refuse or neglect to dwell and reside in the mansion house for a period of six months in each year, or to keep in good and suitable order and condition the said residence, his estate and interest is to cease and determine. Those are two events therefore, upon the happening of either of which the property is to pass. First, if he refuses or neglects to dwell or reside in the mansion house for the proper time each year. Now, I think, there can be no question upon the authorities that to dwell and reside means personally to dwell and reside; but can it be said that a military officer "refuses or neglects" to personally dwell and reside at Loughanmore at a time when the discharge of his military duties requires his personal presence hundreds of miles away?

(1) [1908] 1 Ch. 383.

In *Partridge v. Partridge* (1), where the condition was similar, and the person entitled to possession was an infant, Mr. Justice North says:—"As I pointed out just now, the effect of these limitations is not to give him the estate on condition that he resides and occupies the house, but they are expressed as taking away the estate from him if he does not fulfil the condition, and we must see in what precise event the estate is to go over. The only event mentioned is, if the person who becomes entitled to the estate 'refuses or neglects' to reside in the house; and an infant cannot 'refuse or neglect' to reside in a particular place if the person to whom his legal custody and care are committed do not choose that he shall do so. The words are not if he 'omit' to reside or if he 'does not reside,' but if he 'refuses or neglects' to reside; and in my opinion, an infant who cannot control or fix the place where he is to reside, cannot, within the terms of this clause, be said to 'refuse or neglect' to reside at the place mentioned, and for this reason also the clause does not apply to the infant plaintiff during his infancy." I think the principle of that decision applies to this case. A clause like this, intended to cause a forfeiture in certain events, must receive a reasonable interpretation, having regard to the circumstances of the case. And where a valuable property is given to an officer in the army or navy, whose duties may require his absence from home for a lengthened period, on condition that, if he refuses or neglects to reside for a certain period in each year at a certain house, the property is to go over, it is surely not reasonable to suppose that the settlor intended that necessary absence from home, during part of the required period of residence, for the purpose of discharging his official duty, should amount to a refusal or neglect to reside within the meaning of the condition. His absence on military duty, however, would not prevent him from complying with the second part of the condition, viz., keeping the residence in good and suitable order and condition. I will therefore make a declaration that if the condition is otherwise complied with, personal non-residence at the mansion house solely due to necessary absence on official duty will not be a breach of the condition. It seems to me,

Wylie, J.
1909.

In re
ADAIR.

(1) [1894] 1 Ch. at p. 359.

Wylie, J.
1909.

In re
ADATR.

however, that the tenant for life might get over his difficulty by making a temporary lease under section 10 of the Settled Land Act, 1890. In *In re Thompson* (1) the Master of the Rolls decided that a condition as to residence is void under the Settled Land Acts for the purpose of a lease as well as for the purpose of a sale.

I am also asked to make a declaration defining the condition of residence in this settlement in case of a tenant for life who is not in the public service. This I decline to do. In fact, it is not possible to give a general definition apart from a concrete case. Residence is made up of many elements, and in each case must be determined on the entire facts.

Solicitors for the applicant : *Collis & Ward.*

Solicitors for the infant remainderman : *Whitney & Moore.*

Solicitors for the trustees : *Hayes & Son.*

Solicitors for the next tenant for life : *Whitney & Moore.*

W. M'G.

IN RE MOSES HOUSTON, DECEASED.

RODGERS v. HOUSTON.

(1909. No. 553.)

Wylie, J.
(for *Barton, J.*)
1909.

July 2, 9.

*Settlement—Real estate—Equitable estate in fee—No words of limitation—
Intention.*

By an indenture of settlement, dated the 3rd July, 1897, certain lands were conveyed to trustees, to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates of the persons named:—

Held, that the Court was at liberty to look at the intention of the settlor, as evidenced by the whole deed, and that there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee simple.

Meyler v. Meyler (11 L. R. Ir. 522) not followed, having regard to subsequent authorities.

ORIGINATING SUMMONS.

Application on behalf of George Rodgers, the surviving trustee of an indenture of 3rd July, 1897, for the determination of a number of questions, of which this report is concerned only with the following:—

Whether the estates of the first three defendants in the lands and premises comprised in the said indenture under the trusts created by it are for life only, or for what other estate?

By said indenture of the 3rd July, 1897, James Houston conveyed to trustees in fee certain lands, to hold in trust for Jane Rodgers Houston, Margaret Park Houston, and Elizabeth Houston, as tenants in common. The said indenture contained no words of limitation of the respective estates of the persons named, but provided that if any one of them "shall die before having attained the age of twenty-five years, or without having been married with the consent of the trustees, or without having issue, then in trust for the survivors of them, or of the issue of such survivors or survivor." Margaret afterwards married Daniel Toye.

Wylie, J.
1909.

RODGERS
v.

HOUSTON.

The further provisions of the deed relied on as indicative of the settlor's intention to give equitable estates in fee are fully stated in the judgment of Wylie, J., *infra*, p. 323.

In the event of the interests of the first three defendants being held to be life estates, and there being a resulting trust for James Houston, the settlor, the persons entitled to the lands on the termination of such life estates were the defendants, William Glenn and Alexander Houston, representing the estate of John Houston, deceased, to whom James Houston by his will left his real and personal estate.

Osborne, for the applicant, said there were conflicting authorities on the question involved. In *Meyler v. Meyler* (1) the Vice-Chancellor held in a similar case that he was precluded from going into the question of intention, and held that there being no words of limitation life estates only were given. But in two English cases, *In re Tringham's Trusts*; *Tringham v. Greenhill* (2), and *In re Oliver's Settlement* (3), it was held that the intention might be looked at, and that the equitable fee might be given without words of inheritance.

Chadwick, for Jane Rodgers Houston and Elizabeth Houston :—

No doubt, in *Meyler v. Meyler* (1) Chatterton, V.-C., held that in the absence of words of limitation it was not competent for the Court to endeavour to arrive at the intention of the settlor by looking to the entire deed, but that decision ought not now be followed: *In re Tringham's Trusts* (2); *Oliver's Settlement* (3). The intention of the settlor to confer equitable estates in fee upon the three daughters is clear; the limitation over in the event of any of them dying before having attained twenty-five is inconsistent with life estates only having been acquired, and the provisions as to maintenance and advancement, and the power given to the trustees "to pay off" the share of those who attained twenty-five years of age are conclusive as to the intention.

(1) 11 L. R. Ir. 522. (2) [1904] 2 Ch. 487. (3) [1905] 1 Ch. 191.

Wood, for Margaret Park Toye.

Wylie, J.
1909.

Babington, for William Glenn and Alexander Houston:—

RODGERS
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There are no words of limitation here, and the deed only confers an equitable estate for life on the *cestui que trust*. In a deed executed words of inheritance are necessary to pass an equitable estate in fee, and the Court is not at liberty to look to the intention: *Meyler v. Meyler* (1). No doubt the fee is limited to the trustee, but so it was in *Meyler v. Meyler* (1). The Vice-Chancellor's decision in *Meyler v. Meyler* (1) was followed and approved of in England in *Re Whiston's Settlement* (2). The rule has since been relaxed in England: *In re Tringham's Trusts* (3); *In re Oliver's Settlement* (4); but there is no decision of the Court of Appeal either in England or Ireland, disapproving of the decision in *Meyler v. Meyler* (1); and when the English and Irish authorities differ, an Irish Court should follow the Irish decisions. If the Court is at liberty to look to the intention, no intention to pass the fee can be spelled out of this deed.

WYLIE, J.:—

July 9.

By an indenture of the 3rd July, 1897, James Houston, in consideration of love and affection, conveyed certain lands, of which he was owner in fee, to trustees and their heirs upon trust for the three daughters of his late brother Moses Houston, viz., Jane Rodgers Houston, Margaret Park Houston, and Elizabeth Houston, as tenants in common, provided that if any of them died under the age of twenty-five years and without having been married with the consent of the trustees, or without having issue, then in trust for the survivors of them, or of the issue of such survivors or survivor.

These are the only limitations in the deed of the equitable fee, the legal fee having been vested in the trustees; and the question I am asked to decide is, whether under these limitations of the

(1) 11 L. R. Ir. 522.

(3) [1904] 2 Ch. 487.

(2) [1894] 1 Ch. 661.

(4) [1905] 1 Ch. 191.

Wylie, J. equitable fee, the three daughters of Moses Houston take estates
1909. for life only, or take the fee.

RODGERS
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HOUSTON. Now, there can be no doubt that, if there were nothing else in the deed, these limitations of the equitable estate must be construed in the same manner as similar limitations of the legal estate, and that the three daughters would take estates for life only. But there is a great deal more in the deed, and the question I have to decide is, whether I am at liberty to look at the other provisions of the deed to ascertain, if I can, what the real intention of the grantor was, and if I find in those provisions a clearly expressed intention to give the fee, whether I can so construe the deed.

In *Meyler v. Meyler* (1) the Vice-Chancellor undoubtedly held, in a somewhat similar case, that he was precluded by the authorities from going into the question of intention to be ascertained from the rest of the deed; but in *In re Tringham's Trusts* (2) Mr. Justice Joyce, after carefully reviewing all the authorities, including those upon which the Vice-Chancellor based his judgments, held, that "a limitation, in a deed, of a trust of real estate for A, without any words of inheritance, may confer the equitable fee upon him, where the intention to do so is expressed or sufficiently shown upon the face of the instrument." And the same question being subsequently raised in *In re Oliver's Settlement* (3), Mr. Justice Farwell says:—"The law upon this point has been very recently stated by Joyce, J., in *In re Tringham's Trusts* (2), and I need not therefore state it again. I adopt that as a correct statement of the law, and all I have to consider is, whether in the case before me there is sufficient to show an intention that the children should take the fee."

In each of those cases, the learned Judge held that the intention to confer the fee was sufficiently shown by the other provisions of the deed, and construed the limitations accordingly. The law so laid down and acted upon seems to me to be fully supported by the authorities, and to be in accordance with the general canon of construction that deeds should be construed so as to give effect to the expressed intention of the parties, if

(1) 11 L. R. Ir. 522. (2) [1904] 2 Ch. 487. (3) [1905] 1 Ch. p. 194.

it is possible to do so without infringing any rule of law. Adopting then this view of the law, I have only to apply it to the provisions of the deed before me. Now, there is no question as to the legal fee; it is admittedly conveyed to and vested in the trustees. Then, the only declared trust of the equitable fee is for the three daughters as tenants in common, and in case of the death of any of them under twenty-five or without issue, for the survivors or survivor.

Now that limitation is a simple gift, without the use of any technical terms, except so far as "tenants in common" are technical; and they are equally applicable to a fee as to a life estate. Then there is a direction, that the trustees shall manage the property while any of the daughters is under twenty-five, and apply the rents and profits for their maintenance and education. The deed then empowers the trustees during said period to sell the fee, and out of the principal moneys so realized to advance such sum as they may deem right for the support, maintenance, education, or advancement of any of said daughters, or of the persons for the time being entitled to any of their interests, or *to pay off the share of any of them* who shall have attained the age of twenty-five years, or married under it with consent. Now, are these provisions consistent with an estate for life only being given to the three daughters? Suppose the trustees in the exercise of their powers sell the fee for £3000, and wish to advance £500 to one of the daughters, as they may do under the trusts of the deed, would that be consistent with a life interest only in one-third of the capital money realized by the sale. Or, suppose one of the three daughters has attained twenty-five, and the trustees wish to *pay off her share*. What is her *share*? Is it £1000, one-third of the capital money, or the estimated value of a life interest in £1000? Is it possible to conceive that, by the direction to pay off her share, the grantor could have meant anything else than a payment of one-third of the capital value of the fee. It seems to me, therefore, that these provisions in the deed show conclusively that the grantor intended by this deed to give to each of the daughters one-third of the fee-simple of the lands, subject to the contingent right of survivorship; and, in my opinion, there is

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Wythe, J. no rule of law precluding me from so construing the limitations
1909. in the deed.

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Solicitors for George Rodgers, the applicant: *Wilson & Elliott.*
Solicitor for Jane Rodgers Houston and Elizabeth Houston:

David Wilson.

Solicitors for Margaret Park Towe: *E. M'Fadden & Co.*

Solicitors for William Glenn and Alexander Houston:

Bennett Thompson & M'Neill.

W. M'G.

THE NATIONAL ASSURANCE CO. v. SCOTT.

(1907. No. 781.)

Barton, J.
1908.Nov. 4, 5.
Dec. 21.

Company—Administration of shareholders' estate—Action for calls after administration by the Court—Contingent debt—Pecuniary and residuary legatees—Liability—Following assets.

A creditor, who neglects to prove his debt under the decree in an administration suit, can, after the suit is at an end and the estate has been distributed by the Court, only recover *pro rata* from the recipients of the fund; and, if the residuary estate was sufficient to pay his debt, cannot, as a general rule, recover his debt from pecuniary legatees who were paid their legacies under the decree. But this rule does not apply to the case of a contingent creditor, who had no right to prove under the decree for his contingent debt, or for its estimated value. Such a creditor can, when his debt has ripened, recover from pecuniary legatees upon such terms as the Court may deem it equitable to impose.

A holder of shares not fully paid up in a Company incorporated by charter died, having by her will left pecuniary legacies, and having bequeathed the residue of her estate to residuary legatees. Her estate was administered in a suit in the Chancery Division, in the course of which the pecuniary legatees were declared entitled to, and were paid, their legacies. The liability of the estate in respect of the shares was set forth in the Chief Clerk's certificate. An application was made to the Court to retain a sum to meet the contingent liability for calls upon the shares, but was refused, in accordance with the practice of the Court. After the estate had been distributed by the Court, the Company made a call. The residuary estate of the deceased shareholder had been amply sufficient to discharge the amount of the call. The Company brought an action in the Chancery Division against both the pecuniary and the residuary legatees to recover the amount of the call. The Court came to the conclusion, upon the facts of the case, and upon the true construction of the Company's charter, that the estate of the deceased shareholder continued liable for the call:—

Held, (1) that the Company was not precluded from recovering the amount of the calls from the pecuniary legatees; (2) that as the estate of the deceased shareholder had been distributed by the Court, the claim (being an equitable one) should be granted upon the terms that the residuary estate, being the primary fund for payment, should be resorted to in the first instance, and that

Barton, J. 1908. the pecuniary legatees should be liable, if and in so far as the residuary estate might be insufficient for the purpose of meeting the plaintiffs' claim.

NATIONAL ASSURANCE Co. *Gillespie v. Alexander* (3 Russ. 130) and *Greig v. Somerville* (1 R. & M. 338) distinguished.

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TRIAL OF ACTION.

Miss Annie Callwell, late of 25 Herbert Place, Dublin, was at the time of her death (2nd March, 1904) the registered holder of 300 shares of £25 each in the plaintiff Company. A sum of £2 10s. per share had been paid up originally in respect of these 300 shares of £25 each, and a further sum of £2 10s. in respect of 100 of the shares had been voluntarily paid by her in advance of calls in response to a circular from the Board of Directors.

By her will, dated the 17th February, 1898, Miss Callwell, after reciting that she was possessed of (among other property therein mentioned) certain railway stock and bank and other shares, including shares in the plaintiff Company, and after making a number of specific and charitable gifts and bequests, bequeathed to the defendant Edith Lucy Nugent the sum of £1500 (free of legacy duty); to the defendant Elizabeth Sarah Nugent the sum of £1500 (free of legacy duty); and the residue of her personal estate in equal moieties to the defendant Annie Sidney Scott and the defendant Catherine Scott, whom she appointed her residuary legatees. Annie Sidney Scott and William Smith were appointed executrix and executor, respectively, by her will.

Miss Callwell died on the 2nd March, 1904, and probate of her will was granted to William Smith, power being reserved to make a like grant to Annie Sidney Scott, the other executor named in the will. The gross value of the personal estate was sworn for the purposes of estate duty at £6301 15s. 9d.

After probate had been granted, an action for the administration of the estate of Miss Callwell was commenced by originating summons in the Chancery Division (Master of the Rolls) of the High Court of Justice in Ireland, in which the defendant, Catherine Scott, one of the residuary legatees and one of the defendants in the present action, was plaintiff, and William Smith, the executor, was defendant. The primary decree was made on the 6th March, 1905, which directed the taking of the usual accounts, of personal

estate, debts, and legacies; an inquiry as to the outstanding personal estate; and that the personal estate should be applied in due course of administration. The defendants Edith Nugent and Elizabeth Nugent entered appearances and attended at Chambers at the taking of accounts and inquiries. The certificate of the Chief Clerk was made up on 3rd June, 1905.

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By his certificate the Chief Clerk found that there were no debts remaining unpaid; that the two legacies of £1500, with interest thereon, were payable to the two defendants Edith Lucy Nugent and Elizabeth Sarah Nugent; and that part of the outstanding estate consisted of 100 shares of £25 each, £5 paid, in the National Assurance Company, standing in the name of the testatrix, and 200 shares, £25 each, £2 10s. paid, in the said National Assurance Company, standing in the name of testatrix.

By the order on further consideration, dated the 26th June, 1905, made by the Master of the Rolls, it was ordered and directed (*inter alia*) as follows:—That the said William Smith should lodge in Court a cash balance of £616 3s. 8d., ascertained to be in his hands, and lodge in Court £3960 19s. 3d. New Consols, standing in his name, and that the legacies bequeathed by the will, which included the pecuniary legacies bequeathed to the defendants Edith Lucy Nugent, Elizabeth Sarah Nugent, and Annie Sidney Scott, should be paid out of the said cash balance and the proceeds of the said New Consols and the dividends thereon, should the same prove sufficient for that purpose. The order then proceeded as follows:—“And it appearing that there is no further claim on the assets of said testatrix, and the two residuary legatees under her will so consenting, It is ordered that the said William Smith shall divide the railway stock, National Assurance Company's shares, and the shares in Hugh Moore & Alexanders, Ltd., equally between the two residuary legatees under the said will; and that the said William Smith do make all such transfers and do all such acts as may be necessary for the carrying out of the aforesaid direction; . . . and in the event of there being any surplus remaining of such funds in Court, same to be divided equally between the two residuary legatees.”

On 24th July, 1905, an allocation order was made. The solicitor for Edith Lucy Nugent and Elizabeth Sarah Nugent

Barton, J. consented to the order, and waived their costs as against the funds in Court to enable the immediate payment out of the funds. 1908.

NATIONAL ASSURANCE Co. v. SCOTT. In the course of the suit an application was made to the Master of the Rolls, to have a sum retained to meet the contingent liability upon the shares in the National Assurance Company, but the Master of the Rolls declined to make any such order.

For the purpose of carrying out the order of the Master of the Rolls, the executor executed transfers of 150 shares in the National Assurance Company to each of the residuary legatees, respectively, and procured the residuary legatees to execute them as transferees. He then forwarded them on 24th July, 1905, with a letter informing the Company that Miss Annie Callwell had died, that he was the executor, and that, as such, he had executed these transfers, and asking them to be registered. The Company ultimately, on 15th January, 1906, wrote refusing, under the provisions of their charter, to consent to the transfers, and returning them to the executor's solicitor, who replied that, having regard to the length of time that had elapsed, they could not admit that the Company was now entitled to refuse consent to the transfers.

At the time of the present proceedings Miss Callwell's name still appeared as the name of the registered holder of 300 shares in the books of the plaintiff Company.

On or about the 31st August, 1906, the plaintiff Company made a call of £6 per share on all the registered holders of shares in the Company, and the defendants were now called upon by the plaintiffs to pay the said call in respect of the said 300 shares, which the defendants refused to do; and the plaintiffs alleged that there was due to them on foot of the call in respect of the 300 shares (after deducting the payment made in advance of calls in respect of 100 of the shares as before mentioned) the sum of £1550.

The winding-up provisions of the Companies Acts were, by a special Act of Parliament, made applicable to the National Assurance Company. By a special resolution passed by the shareholders in a general meeting held on the 12th March, 1907, it was resolved that the plaintiff Company should be voluntarily wound up, and this special resolution was duly confirmed by a resolution passed by the shareholders in a meeting held on 5th

April, 1907; and by a further resolution passed on the same day Augustus Klingner, of 36, College Green, chartered accountant, was appointed liquidator of the Company, by whose direction the present action was brought.

Separate defences were filed on behalf of the defendants Edith Lucy Nugent and Elizabeth Sarah Nugent.

There were three principal defences—(1) that, upon the facts of the case and the construction of the charter, the estate of the deceased shareholder had ceased to be liable for the calls, and that the liability of the executors or of the residuary legatees had been substituted for that of the estate; (2) laches; and (3) that, as the estate of Annie Callwell had been fully administered by the Court, and as the residuary estate had been sufficient to meet the Company's claim, the Company could not recover the calls from the pecuniary legatees. The case is reported upon the latter point only, and the facts, correspondence, clauses of the charter, and arguments relating to the other defences are omitted from the reports.

Blood, K.C., S. L. Brown, K.C., and W. G. Gibson, for the plaintiff.

Ronan, K.C., and Gerald FitzGibbon, K.C., for the defendant Edith Lucy Nugent:—

At the time of the administration proceedings the residuary estate was ample to meet the amount of the calls. Therefore, the plaintiffs, whether they were or were not in a position to prove for their debt in the administration action, are now debarred from proceeding against the pecuniary legatees. That is the rule where an estate has been administered by the Court: *Gillespie v. Alexander* (1); *Greig v. Somerville* (2); *Todd v. Studholme* (3); *Davies v. Nicholson* (4). But where the estate has been distributed by the executor the rule is otherwise. The legatees in the present case are in legal possession of their legacies under the order of the Court, and therefore the plaintiffs' claim is merely an equitable one, and the rule by which they are bound is as above stated. Reference

(1) 3 Russ. 130.

(2) 1 R. & M. 338.

(3) 3 K. & J. 324.

(4) 2 De G. & J. 693.

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Barton, J. may also be made to the case of *Noble v. Brett* (1). That was not
 1908. a case of administration by the Court, and was decided before the
 NATIONAL passing of Lord St. Leonards' Act. [They also argued, upon the
 ASSURANCE facts and correspondence, and upon the construction of the charter,
 Co. that the estate of the deceased shareholder had ceased to be liable
 v. for the calls, and that the liability of the executor or of the
 SCOTT. residuary legatees had been substituted.]

Bates, K.C., for the defendant Elizabeth Sarah Nugent, supported the contention put forward on behalf of the other defendant, and also argued that the Company were guilty of laches and unreasonable delay in making the call, and therefore precluded from recovering the amount of the call.

S. L. Brown, K.C., in reply :—

The rule stated by Mr. Ronan only applies to the case of a creditor who, having an existing debt at the time of the administration proceedings, holds back, and fails to come in at the proper time. Such a creditor is only allowed to come in as a matter of grace, and he is subject to the rules of Equity. The rule cannot be extended to a case like the present, in which the debt was merely contingent at the date of administration, and where, as here, there is no evidence of any undue delay on the part of the plaintiffs to make the calls, and convert a contingent liability into an existing debt.

Dec. 21.

BARTON, J. :—

This is an action to follow assets of a deceased shareholder, or, in other words, to compel her legatees to refund. The plaintiff is the National Assurance Company, incorporated by charter; and the action is brought in respect of calls, which were made by the Company after the personal estate of the deceased shareholder had been distributed in an administration suit. The winding-up provisions of the Companies Acts were, by a special Act of Parliament, made applicable to the Company; and, since the making of the call, the Company have gone into voluntary liquidation.

[The learned Judge having stated the material facts, and the relevant provisions of the charter, held that the defence of laches failed, and that the estate of the deceased shareholder Annie Callwell continued liable to calls. He then proceeded as follows:]

Mr. Ronan contended, lastly, that, as this estate has been administered by the Court, and as the residuary legatee has received under the decree more than enough to pay these calls, the plaintiff Company have no remedy against the pecuniary legatees. He cited *Gillespie v. Alexander* (1), *Greig v. Somerville* (2), *Davies v. Nicholson* (3), and *Todd v. Studholme* (4); and he argued that from these cases there is to be extracted a general rule, that when an estate has been administered by the Court, a creditor coming in after distribution of the estate can only recover *pro rata* from the recipients of the fund; and that, in accordance with this rule, the plaintiff Company have no right to recover these calls from pecuniary legatees, where the residuary estate (the primary fund for the purpose) was sufficient to pay the debt. But a careful examination of these cases does not, in my opinion, carry this "*pro rata* rule," if I may so call it, beyond the case of a creditor who might have proved under the decree, which is not the present case. So far as this branch of the case is concerned, nothing turns upon the provisions of the charter.

The opening paragraph of Lord Eldon's judgment in *Gillespie v. Alexander* (1) is the leading authority upon the general rights of a creditor who comes in late under a decree. Those general rights are to prove for his debt, subject to terms as to costs, so long as there is a residuary fund in Court; and, if the fund has been distributed, to sue the legatees, and make them bring back the fund. In that case the fund had been partly paid out, and there remained in Court the shares coming to a few of the legatees who were infants or had partial interests. Lord Eldon held that, as between these legatees "and a creditor not coming in sooner," these legatees were only liable to pay a due proportion of the debt, leaving the creditor to her remedy by a suit against the others. The key to this branch of Lord Eldon's judgment is contained in the words on page 138—"a creditor not coming in sooner."

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(1) 3 Russ. 130.

(3) 2 De G. & J. 693.

(2) 1 R. & M. 338.

(4) 3 K. & J. 324.

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Similarly, in *Greig v. Somerville* (1), Lord Lyndhurst applied the same "*pro rata* rule" where a creditor came in late, and sought to make an infant's fractional share, which remained in Court, responsible for his whole debt. The key to Lord Lyndhurst's judgment is contained in the words (at p. 345) "*under these circumstances.*" What were "these circumstances"? They were very striking. The debtor died in 1807; the decree was made in 1817, and the creditor did not come in until 1825. These two cases—the parent stock of this "*pro rata* rule"—were cases of creditors who had the opportunity of coming in under a decree, pretermittting that opportunity, and coming in after the fund had been distributed by the Court.

Gillespie v. Alexander (2) and *Greig v. Somerville* (1) were cited in *Davies v. Nicholson* (3); and Turner, L.J., in the latter case made the point which distinguishes those cases from the present one, when he said at p. 702, "But do those cases apply? I think not. In those cases the creditor *was in default for not having come in under the decree.*" *Todd v. Studholme* (4) was not a case of a creditor seeking to follow assets which had been distributed. It was a case of a mortgagee who was entitled to the proceeds of mortgaged property which was sold in an administration suit with the mortgagee's concurrence free from incumbrances. The purchase-money was paid into Court; and by the gross negligence of the solicitor having carriage of the suit, aided by the omission of the mortgagee's solicitor to obtain a stop-order, the fund was, by mistake, paid out to the specialty and simple contract creditors. The Court took care that the mortgagee should be paid every penny of his money—by ordering the solicitor having carriage of the suit to pay the deficiency. But, as between the creditors *inter se*, the Court applied the rule, which Lord Hatherley said was applicable to "the common case of a creditor coming to draw back a fund" which had been distributed by the Court. He went on to say at the top of page 336: "That common case is settled by the authority of the decree in *Gillespie v. Alexander* (2) and *Greig v. Somerville* (1), which establish that when a creditor comes, after the distribution

(1) 1 R. & M. 338.

(3) 3 De G. & J. 693.

(2) 3 Russ. 130, at p. 136.

(4) 3 K. & J. 324.

of a fund under the decree of this Court, and files his bill against any of the recipients of the fund to have that fund restored, he can only recover *pro rata* against them." He was evidently referring to "a creditor" who, as in the two cases which he cited, was a creditor at the date of the suit, and might have shared in the distribution of the fund.

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In the present case the administration suit was at an end, and the estate of the deceased shareholder had been distributed in July, 1905; the call was made in August, 1906; and the winding up commenced in April, 1907. This was not one of those cases in which a contingent creditor may be entitled to prove in an administration suit for the estimated value of his contingent debt, *e.g.* where the estate is insolvent, under the bankruptcy law imported by a section of the Judicature Act. Reference may also be made to section 75 of the Companies Act, 1862. It has not been contended that these or any other statutory provisions would, in the present case, have enabled the plaintiff Company to prove, under the decree, for the estimated value of future calls, or that any other relief in respect of future calls could have been obtained in the suit. The plaintiffs could not have got a stop-order. It is not the practice of this Court to retain funds for the protection of such contingent creditors: *Buckley v. Nesbitt* (1); *In re King* (2). An application of that kind was made in the suit, and was rejected by the Judge. In this connexion I may observe that all the parties to the administration suit, including the pecuniary legatees, had the clearest notice of this contingent liability.

The Company's claim against the pecuniary legatees is, in my opinion, maintainable. But the claim is an equitable one, to be granted upon such terms as the Court deems it equitable to impose. Those terms will be, that the debt should be paid in the first instance out of the residuary estate, if available; and out of the pecuniary bequests only if the primary fund is irrecoverable. There will be an inquiry whether the money received by the residuary legatees can be recovered; and the pecuniary legatees will only be liable, in so far as what shall be

(1) 5 L. R. Ir. 199.

(2) [1907] 1 Ch. 72.

Barton, J. recovered from the residuary legatees may be insufficient for the
1908. purpose of meeting plaintiff's claim.

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There will be liberty to apply.

Solicitor for the plaintiffs: *Overend*.

Solicitors for the defendants: *Ross Todd; Hone & Falkiner*.

J. MAC M

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IN RE DEANE'S TRUSTS.

May 10. *Bankruptcy—Lease—Vesting—Reversionary equitable interests in leaseholds—
Election—Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 154.*

Section 145 of the Bankruptcy Act, 1849, which contained provisions similar to those contained in section 271 of the Irish Bankruptcy Act of 1857, did not affect mere equitable interests in leaseholds.

APPLICATION on behalf of James Roche Deane, as administrator of the personal estate of Alexander Deane, for an order declaring him entitled, after payment of costs, to the residue of certain stock now in bank to the credit in the title hereof.

By her will, dated the 19th May, 1827, Elizabeth Deane devised and bequeathed to her sons, Thomas Deane and Alexander Sharpe Deane, and the survivor of them, and the executors and administrators of such survivor, all her leasehold premises of which she was then, or might thereafter be, possessed, subject to certain life annuities which had expired long before the date of the application, upon trust to pay to her sons James, Kearns, and William, during their respective natural lives, the yearly rents, issues, and profits thereof, share and share alike, as tenants in common; and from and after the death of either of them, the said testatrix directed her trustees to convey their respective undivided shares to their respective first and every other son successively, in tail male. On the death of the testatrix her son, James Roche Deane (referred to in the will as James Deane) entered into receipt of the rents and profits of one-third part of her various leasehold properties, under the trusts of the said will. The said James Roche

Deane had an eldest son, Alexander Deane, whose only surviving son was James Roche Deane, the applicant. On the 16th January, 1865, the said Alexander Deane was adjudicated a bankrupt in the Court of Bankruptcy, London; and in his statement of affairs, filed the 21st March, 1865, he included his reversionary interest in the one-third of the leasehold properties. No dividend was ever declared in said bankruptcy, and the said Alexander Deane obtained his discharge on the 21st March, 1865.

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The said Alexander Deane died on the 28th March, 1870, and the said James Roche Deane, the elder, on the 2nd January, 1876; and on the 16th March, 1909, letters of administration intestate of the said Alexander Deane were granted to James Roche Deane, the applicant. During the lifetime of James Roche Deane the elder, the one-third of the net rents was paid to him by the trustees; but since his death said one-third of the net rents had been set apart and invested in Government stock, and there were now in Court to the credit of the matter New Consols, £727 7s.; India 3½ per cent. stock, £153 2s. 2d., and cash, £5 11s. Applicant submitted that, inasmuch as the assignee in bankruptcy had never elected to take the reversionary leasehold interests of the said Alexander Deane, the same remained vested in Alexander Deane, and that the sums of stock and cash now in Court to the credit of the matter were now properly transferable and payable to him as Alexander Deane's personal representative; and he also submitted that an election could not have been made by the official assignee in the bankruptcy matter.

Walker, K.C., for the applicant, contended that the leaseholds did not vest in the assignee until election; that they were bound to elect within a reasonable time; and that, not having so elected, they could not now elect, so as to capture the stock and money in Court: Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 145; Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 131; *Copeland v. Stephens* (1); *Goodwin v. Noble* (2); *Hanway v. Taylor* (3), which was decided under corresponding sections of the Irish Bankruptcy Act, 1857 (20 & 21 Vict. c. 60). The law upon the subject is

(1) 1 B. & Ald. 303, 593, and at p. 607. (2) 8 E. & B. 587.

(3) 1 I. R. 8 C. L. 254.

Barton, J. shortly stated in Smith's Leading Cases (1903), vol. i, p. 49 ; 1909. *Mackley v. Pattenden* (1); *Lawrence v. Knowles* (2).

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Hewitt Poole, for the Official Assignee, submitted that the case must be decided independently of the principles relied on by counsel for the applicant. The sections he relied on had relation to legal interests in leasehold property, and not to purely equitable interests, as in this case. Section 142 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), is general, and gives the Official Assignee everything. Section 145 of that Act, which is a parallel section to section 271 of the Irish Act of 1857 (20 & 21 Vict. c. 60), does not apply to equitable interests. The case of *In re Gee*; *Ex parte Official Receiver* (3) is clearly in point, and shows that the leaseholds are now vested in the Official Assignee.

Walker, K.C., in reply, submitted that there was no foundation for the argument that the section applied only to legal estates. The section dealt with in *In re Gee*; *Ex parte Official Receiver* (3) is essentially different from section 145 of the Act of 1849. Under Deasy's Act (23 & 24 Vict. c. 154) the bankrupt could have been sued for the rent; and it would have been no answer to say that the legal estate was outstanding in some one else. Once it is ascertained to be leasehold, and that it is subject to a rent, all the cases show that it does not vest until election.

BARTON, J. :—

Mr. Walker has rested his case upon four propositions. He argued that the bankrupt's interest in this leasehold property could not, having regard to section 145 of the English Bankruptcy Act, 1849, vest in the assignees in bankruptcy until election; that the assignees did not elect; that election should be made within a reasonable time; and that the forty-four years which have intervened between 1865 and 1909 is an unreasonable time, after the lapse of which the official receiver should not be now allowed to elect. As regards the three latter propositions, Mr. Walker made a strong case, which I need not discuss, because I agree with Mr. Poole's contention, which was to the effect that the bankrupt's

(1) 1 B. & S. 178. (2) 5 Bing. N. C. 399. (3) 24 Q. B. D. 65.

equitable interest in this leasehold trust estate vested in the assignee in bankruptcy, and was not affected by section 145 of the Act of 1849.

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Section 145 of the English Bankruptcy Act of 1849, which is similar to section 271 of the Irish Act of 1857, was mainly concerned with the liability for rent or for damages for breach of covenant in leases, when the person having, or being entitled to, any lease or agreement for a lease became bankrupt. If the assignee in bankruptcy elected to take the lease, the bankrupt ceased to be liable to rent or covenants. If the assignee did not elect to take the lease, the bankrupt could, under certain conditions, deliver up the lease to the lessor; and if the assignee declined to determine whether he would elect, an application might be made to the Court for relief, as provided therein. The section was, as I have said, mainly conversant with liability for rent or for damages for breach of covenant.

In the present case I understand it to be admitted that the lessees, or persons entitled to, and liable to the rents and covenants in, these leases, were and are the trustees of this leasehold trust estate. Alexander Deane, the bankrupt, was, at the date of his adjudication in 1865, entitled, subject to his father's equitable life interest, to a reversionary equitable interest in one-third of the rents and profits of the leasehold trust estate. His reversionary interest did not fall into possession in his lifetime. He died in 1870, predeceasing his father, who died in 1876. Since the latter's death the trustees have set apart and invested one-third of the rents and profits *in usum jus habentis*. The persons in privity of contract with the lessors always were and are the trustees. They were liable to rent and covenants, and they have hitherto discharged their obligations. There is no ground for suggesting that the bankrupt was ever legally liable to the rent and covenants of any of these leases, or that anything occurred to make him an assignee of any lease within the meaning of Deasy's Act or otherwise, or to enable the lessors to treat him as such. Equitable liability to the lessors was, of course, out of the question: *Ramage v. Womack* (1).

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The bankrupt's mere equitable reversionary interest in a share of the rents and profits of this leasehold trust estate was not, in my opinion, affected by section 145. That being so, this application, which is made on behalf of the bankrupt's personal representative, must be refused.

Solicitors for the applicant : *Orpen & Sweeney.*

Solicitors for the Official Assignee of Alex. Deane, bankrupt :

S. S. & E. Reeves & Sons.

W. M'G.

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June 9, 15.

Appeal.

July 29, 30.

ESTATE OF THE RIGHT HON. HENRY O'CALLAGHAN, BARON DUNALLEY.

*Purchase agreement—Bonus—Treasury Revision Order—Irish Land Act,
1903, section 48, sub-sections 1, 3.*

For two years prior to October, 1908, negotiations were pending between D. and the tenants on his estate, with a view to the sale of the latter to the tenants, under the provisions of the Irish Land Act, 1903. On the 9th October, 1908, D. met a deputation from his tenants, when the terms of sale were discussed and finally agreed upon, subject to ratification by the tenants themselves, and these terms were subsequently, on the 11th October, 1908, agreed to by the general body of the tenants, one of said terms being that a binding agreement for the sale should be entered into prior to the 1st November, 1908, so as to ensure to the vendor the bonus at the rate of 12 per cent. A survey of the estate was then proceeded with; but as it was impossible to complete this, and to have agreements in the prescribed form completed and signed before the 1st November, 1908, a single agreement, embodying the terms of sale which had been arrived at, was prepared by D.'s solicitor, approved of by the solicitors for the tenants, and signed by the tenants on the 29th October, 1908. This agreement was not signed by D. (who was nevertheless anxious to carry it out) until after the 24th November, 1908, on which day the Treasury published, pursuant to section 48, sub-section 3, of the Irish Land Act, 1903, notice of the revision of the rate of the percentage payable out of the Land Purchase Aid Fund. After the signing of the agreement by the tenants, the survey of the estate was proceeded with, but had not been completed, nor had purchase agreements in the prescribed form been signed, prior to the 24th November, 1908. The agreement of the 29th October, 1908, recited that one of the conditions of sale was that a binding agreement should be entered into

before the expiration of five years from the passing of the Irish Land Act, 1903, so as to ensure to the vendor the full bonus of 12 per cent. upon the agreed price; and it was thereby (*inter alia*) provided that the vendor agreed to have the necessary survey of the estate made, and maps and schedules thereof prepared, and to have such agreements or other documents as might be necessary for carrying out the sale prepared, which agreements or other documents the purchasers agreed to sign within six months from the date of the preliminary agreement; that the turbary rights enjoyed by "certain of the purchasers" should be continued, and all other turbary on the estate vested in trustees to be nominated by the purchasers; that certain untenanted lands, comprising 500 acres, should be offered for sale to the Estates Commissioners, and that all evicted tenants of holdings on the estate should be reinstated in their holdings, unless such holdings had been relet to others.

On a case stated by the Estates Commissioners:—

Held, by Mr. Justice Wylie and the Court of Appeal (affirming his decision), that the agreement of the 29th October, 1908, was a purchase-agreement, sufficient to answer the terms of section 48 of the Irish Land Act, 1903, enabling D. (if otherwise entitled) to obtain the 12 per cent. bonus.

CASE STATED by the Estates Commissioners for the decision of the Judicial Commissioner, as follows:—

For upwards of two years prior to the month of October, 1908, there had been negotiations between Lord Dunalley and the tenants on his Kilboy estate, with a view to a sale thereof under the provisions of the Irish Land Act, 1903.

On the 9th October, 1908, Lord Dunalley met a representative deputation from his said tenants at Nenagh. The said tenants were accompanied by the clergymen of their respective parishes on the estate, and their solicitor, Mr. James O'Brien, of Nenagh, and Lord Dunalley was accompanied by his agent and solicitor. The terms of sale were discussed and finally agreed to at said meeting between Lord Dunalley and the representatives of the tenants, subject to ratification by the tenants themselves. The terms of sale arranged at said meeting were subsequently, on the 11th October, 1908, submitted to the general body of the said tenants, and were agreed to by all said tenants, with the exception of about twelve of the tenants of the lands of Templeberry, who held under first term judicial rents. Notwithstanding that the said twelve tenants were unwilling to agree to the said terms of sale, the remainder of said tenants were willing and agreed to proceed with the said sale on the terms agreed upon at the said meeting.

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Acting on the instructions of Lord Dunalley, his solicitors proceeded forthwith to take all necessary steps (including the survey of the said estate, the preparation and printing of the agreements in the prescribed form, the calculation of the purchase-prices, and the perusal of the title-deeds) with a view to having the sale of the said estate on the terms agreed upon carried out.

Owing to the necessity for procuring said survey, it became impossible to have the said agreements in the prescribed form completed and signed before the 1st day of November, 1908. And as one of the conditions of the said sale was that a binding agreement therefor should be entered into before the 1st day of November, 1908, so as to ensure to the vendor the bonus at the rate of 12 per cent., a preliminary agreement, embodying the terms of the said agreement for sale, was prepared by Lord Dunalley's solicitors, and settled by counsel, and approved of by the solicitor for the said tenants. The said preliminary agreement was, on the 29th October, 1908, duly signed by the several tenants whose signatures appear on the schedule thereto, and the said signatures of said tenants were witnessed by Mr. James O'Brien, solicitor, Nenagh, acting as solicitor for the said tenants. The original of said preliminary agreement, dated the 29th October, 1908, is incorporated with this case.

The survey of the said estate was duly proceeded with, but could not be, and was not, completed at the date of the publication by His Majesty's Treasury of the notice of the revision of the bonus.

Lord Dunalley and the said tenants are most anxious that the said sale should be carried out; but Lord Dunalley is unwilling to go on with it unless he can rely on receiving the bonus on the purchase-money at the rate of 12 per cent.

On the 15th January, 1909, Mr. C. H. Maude, the agent of Lord Dunalley, wrote a letter to the secretary of the Estates Commissioners, of which the following is a copy:—

“ In this estate the landlord and tenant entered into an agreement for the sale and purchase of this estate prior to the 31st day of October, 1908, and I beg to enclose you the terms agreed on, signed by Lord Dunalley, finally settled on the 9th October, 1908, and the agreement, signed by the tenants, dated the 29th October, 1908.

"It was found impossible to get a survey made of the estate in time, and we did not like to get the agreements signed on the forms prescribed, until we had the maps and areas, as it might have given the Estates Commissioners a lot of extra trouble, and the agreements would have necessarily been prepared in a great hurry.

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"Lord Dunalley is most anxious the tenants should get the benefit of the agreement, as they get off a considerable amount of rent, and a considerable reduction in their annual payments; but if the agreement falls through, they must pay up the rent, and continue to pay rent instead of interest.

"The maps and survey have been completed by Mr. George Garvey, C.E.; and if the Estates Commissioners will accept the agreements as of the 31st October, 1908, they will be completed at once and lodged; but if not, the whole agreement will fall through.

"Should the Estates Commissioners feel any difficulty, Lord Dunalley would ask that the opinion of the Judicial Commissioner should be taken on the matter, as it is of very grave importance to the landlord and his tenants."

On the 15th February, 1909, the assistant-secretary of the Estates Commissioners wrote to the said Mr. C. H. Maude, in reply to said letter of the 15th January, 1909, a letter, of which the following is a copy:—

"With reference to your letter of 15th ulto., I am directed by the Estates Commissioners to return herewith the preliminary agreement, dated 29th October, 1908, which accompanied same, and to state that they are not prepared to express any opinion on the question of law raised in your letter under reply. But if formal proceedings for sale are instituted before them in the usual way, they will, on the application of the owner, refer any questions of law arising on the facts for the decision of the Judicial Commissioner, under section 23 (1) of the Irish Land Act, 1903.

"It is observed that the preliminary agreement has not yet been signed by the owner."

In accordance with the suggestion in said letter of 15th February, 1909, and by leave of the Estates Commissioners, formal proceedings have been instituted in the said matter by the

Wylie, J. lodgment of an originating application by Lord Dunalley. At
1909. the request of the vendor the Estates Commissioners submit the
In re following questions of law for the decision of the Judicial
DUNALLEY'S ESTATE. Commissioner :—

1. Whether, on the facts stated in this case, there was an agreement entered into prior to the publication by His Majesty's Treasury of the revised percentage, sufficient to entitle Lord Dunalley to the bonus at the rate of 12 per cent. if he proceeds with the sale on the terms arranged, as set forth in the agreement of 29th October, 1908 ?

2. If not, whether, if he proceeds with the sale on the said terms, he can rely on receiving the bonus at the rate of 12 per cent. on any, and if so what, portion of the proceeds of sale ?

3. Whether purchase-agreements, if signed now in the prescribed form, in accordance with the said terms, would be deemed to have been entered into prior to 24th November, 1908 ?

The agreement of the 29th October, 1908, mentioned in the case stated, was in the following terms :—

“Memorandum of agreement, made the 29th day of October, 1908, between the Right Hon. Henry O'Callaghan, Baron Dunalley, of Kilboy, Nenagh, in the county of Tipperary (hereinafter called the vendor), of the one part, and the several tenants whose names are set forth in the schedule hereto (hereinafter called the purchasers), of the other part. Whereas, the purchasers are at present tenants to the vendor of holdings on his Kilboy estate, in the neighbourhood of Nenagh, county Tipperary, and have approached the vendor with a view to his selling the said holdings to them, and of his offering the lands hereinafter mentioned and the village of Silvermines for sale to the Estates Commissioners, under the provisions of the Irish Land Act, 1903. And whereas, with a view to arranging the terms of purchase, a meeting was held between the vendor and the duly authorized representatives of the purchasers at Nenagh aforesaid, on the 9th day of October, when the following terms were agreed upon, and have since been ratified by the purchasers. And whereas, one of the conditions of the sale agreed upon was that there should be a binding agreement duly entered into before the expiration of five

years from the commencement of the said Irish Land Act, 1903, so as to ensure the vendor receiving the full bonus of 12 per cent. upon the agreed prices. Now, it is hereby agreed by and between the vendor and the purchasers, as follows:—

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"1. In case an estate, comprising the holdings of the purchasers, shall be sold under the provisions of the Irish Land Act, 1903, the vendor hereby agrees to sell, and each of the purchasers hereby agrees to purchase, the holding described in the said schedule opposite to his or her name for a sum calculated, (a) in case the said holding is subject to a judicial rent fixed or agreed to since the passing of the Act of 1896, at 22½ years' purchase of such rent, (b) in case the said holding is subject to a judicial rent fixed or agreed to before that date, or is subject to a non-judicial rent, at 20½ years' purchase of such rent.

"2. The purchasers to pay interest upon the said purchase-moneys, calculated at the rate of 3½ per cent. from the 1st day of November, 1908, while the said sale is pending, such interest to be payable on 1st May and 1st November in each year.

"3. The half-year's rent due to 1st May, 1908, to be paid by such of the purchasers as have not already paid it to the vendor in cash. In any cases in which arrears are due prior to that date, a half-year's rent to be added to the purchase-money. The half-year's rent which will fall due on 1st November, 1908, to be forgiven as one of the conditions of sale.

"4. In the case of any holdings which, on the completion of the said sale, will be liable to pay an apportioned part of the drainage maintenance rate at present paid by the vendor, a sum calculated on an average of the apportioned part of such rate which would have been payable in respect of such holding during the past three years, had the said rate been previously apportioned, to be deducted from the rent of such holding before calculating the purchase-price thereof; and the purchase-price to be calculated at the rate applicable to such holding, as hereinbefore mentioned, on the balance of the said rent. For the purpose of arriving at the amount of such deduction, the vendor agrees to obtain from the Commissioners of Public Works a provisional apportionment or fractional table of the said drainage maintenance rate, showing the fraction thereof which will be payable in respect of such hold-

Wylie, J. ings by the purchasers thereof, and both he and the purchasers
1909. agree to be bound thereby.

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"5. All sporting rights within the meaning of the Irish Land Act, 1903, to which the vendor may be entitled over and upon the lands agreed to be sold, exclusive of the tenants, shall be reserved without power of alienation, to the vendor and his son, the Hon. Henry Cornelius O'Callaghan Prittie, during the lifetime of the survivor, and thereafter shall be vested in the tenants.

"6. No mineral rights, nor any water or other rights, which the vendor is exercising, or which are not in his possession or enjoyment at the time of the said sale, shall be included therein or affected thereby.

"7. The vendor agrees to have the necessary survey of the estate made, and maps and schedules of areas thereof prepared; and, as soon as that has been done, to have such agreements and other documents as may be necessary for carrying out the said sale prepared; and the purchasers agree, when called upon at any time within six months from the date thereof, to sign such agreements or other documents, so prepared as aforesaid, as may be necessary for carrying out said sale.

"8. All rights of turbary at present enjoyed by certain of the purchasers to be continued, and all other turbary on the estate shall be vested in three trustees, to be nominated by or on behalf of the purchasers, for the benefit of the said purchasers.

"9. The untenanted lands on the estate, known as Cooleen and Springpark, Cashels, Lahid Hill, and Knockaphortaderg, containing together 500 acres statute measure, or thereabouts, to be offered for sale to the Estates Commissioners.

"10. The village of Silvermines to be offered for sale to the Estates Commissioners, with a view to the holdings therein being re-sold by them to the tenants thereof.

"11. All evicted tenants of holdings on the estate to be reinstated in the holdings from which they were evicted, and allowed to purchase, unless such holdings have been re-let to others. The purchase-price, in case of reinstatement, to be, if holding ejected prior to 1896, or if, though subsequent to 1896, the rent at date of ejection was a first term rent or a non-judicial rent, 20½ years'

purchase of rent at date of ejectment; otherwise, $22\frac{1}{2}$ years' purchase of rent at such date.

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"12. In case any of the purchasers shall refuse or neglect to carry out this agreement, or, owing to the discovery of a defect in the title, or of some circumstances injuriously affecting his title, the vendor is unable or unwilling to proceed with the said sale, then this agreement shall be void if the vendor shall so desire, and shall give notice in writing to the purchasers to that effect; and the purchasers shall thereupon become liable to pay all rent and arrears, as if this agreement had not been made.

"13. The lands held in common to be apportioned amongst the holders of such lands.

"In witness whereof the parties aforesaid have hereunto set their hands, the day and year first herein written.

"Signed by the said Right Hon. Henry O'Callaghan, Baron Dunalley, in the presence of ."

The foregoing agreement was signed by 220 tenants out of 300, and after the date thereof, and before the case was heard before Wylie, J., purchase agreements in the prescribed form were signed by 213 tenants, and it was stated on behalf of the vendor that others were willing to sign such agreements if the sale could proceed.

S. L. Brown, K.C., for the vendor.

Serjeant O'Connor, K.C., and *Dudley White*, for the Treasury.

D. S. Henry, K.C., for the tenant-purchasers.

WYLIE, J. :—

June 15.

By a case stated the Estates Commissioners have submitted to me the following questions of law :—

1. Whether, on the facts stated, there was an agreement entered into prior to the publication by His Majesty's Treasury of the revised percentage sufficient to entitle Lord Dunalley to the bonus at the rate of 12 per cent. if he proceeds with the sale on the terms arranged, as set forth in the agreement of 29th October, 1908?

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2. If not, whether, if he proceeds with the sale on the said terms, he can rely on receiving the bonus at the rate of 12 per cent. on any, and if so what, portion of the proceeds of sale?

3. Whether purchase-agreements, if signed now in the prescribed form, in accordance with the said terms, would be deemed to have been entered into prior to the 24th November, 1908?

The facts as stated are as follows:—

For upwards of two years prior to the month of October, 1908, there had been negotiations between Lord Dunalley and his tenants on his Kilboy estate, with a view to a sale thereof under the provisions of the Irish Land Act, 1903.

On the 9th October, 1908, Lord Dunalley met a representative deputation from his said tenants at Nenagh. The said tenants were accompanied by the clergymen of their respective parishes on the estate and their solicitor, Mr. James O'Brien of Nenagh, and Lord Dunalley was accompanied by his agent and solicitor. The terms of sale were discussed and finally agreed to at said meeting between Lord Dunalley and the representatives of the tenants, subject to ratification by the tenants themselves. The terms of sale arranged at said meeting were subsequently, on the 11th October, 1908, submitted to the general body of the said tenants, and were agreed to by all said tenants with the exception of about twelve of the tenants of the lands of Templeberry, who held under first-term judicial rents. Notwithstanding that the said twelve tenants were unwilling to agree to the said terms of sale, the remainder of the said tenants were willing, and agreed to proceed with the said sale on the terms agreed upon at the said meeting. Acting on the instructions of Lord Dunalley, his solicitors proceeded forthwith to take all necessary steps, including the survey of the said estate, the preparation and printing of the agreements in the prescribed form, the calculation of the purchase-prices, and the perusal of the title-deeds, with a view to having the sale of the said estate on the terms agreed upon carried out. Owing to the necessity for procuring said survey, it became impossible to have the said agreement in the prescribed form completed and signed before the 1st day of November, 1908; and as one of the conditions of the said sale was that a binding agreement therefor should be entered into before the 1st day of November, 1908, so as to ensure to the

vendor the bonus at the rate of 12 per cent., a preliminary agreement, embodying the terms of the said agreement for sale, was prepared by Lord Dunalley's solicitors, and settled by counsel, and approved of by the solicitor for the said tenants. The said preliminary agreement was, on the 29th October, 1908, duly signed by the several tenants whose signatures appear in the schedule thereto, and the said signatures of said tenants were witnessed by Mr. James O'Brien, solicitor, Nenagh, acting as solicitor for the said tenants.

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Now that agreement, as one would expect from the way in which it was prepared, sets out clearly and specifically the terms upon which Lord Dunalley had then agreed with his tenants on his Kilboy estate for the sale and purchase of their several holdings, and the schedule attached, and referred to therein, sets out the particulars of 418 holdings, showing in columns, in respect of each holding, the townland, the name of the tenant, the acreage, the nature of the tenure, and, where judicial, the date on which rent had been fixed. The great majority of the tenants signed that agreement, as stated, on the 29th October, 1908. A few of them did not sign, and the agreement was not signed by the landlord or his agent. If that agreement had, on the 29th October, 1908, been signed by all the tenants and by the landlord, I think there could be no question that it would, if carried out, be an agreement for purchase entered into prior to the 24th November, 1908, notwithstanding that it contains a clause binding landlord and tenants to take such steps and execute such further agreements and documents as may be required to carry out the sale in accordance with the prescribed rules and forms.

Does, then, the fact that the agreement was not signed by some of the tenants prevent it from operating as an agreement for purchase of their respective holdings by the tenants who signed? The 12th clause of the agreement, which provides for such a contingency, is in these terms—"In case any of the purchasers shall refuse or neglect to carry out this agreement, or, owing to a discovery of a defect in the title, or some circumstances injuriously affecting the title, the vendor is unable or unwilling to proceed with the sale, then this agreement shall be void if the vendor shall so desire, and shall give notice in writing to the purchasers to that

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effect; and the purchasers shall thereupon become liable to pay all rent and arrears, as if this agreement had not been made." It seems to me that that clause has no more effect upon the agreement than the ordinary clause in a contract of sale giving the vendor, in certain events, a right to rescind; and if the vendor does not choose to exercise his right to rescind, the agreement stands good as against those who were bound by it. If he exercises his right, and avoids the contract, the question of bonus will never arise. Whether, in the events that have since happened, he could still exercise that right is a question which I have not to consider. The questions submitted to me only arise when the sale has been carried out.

Now, so far, I have assumed that Lord Dunalley had signed the agreement of the 29th October, 1908. Does it make any difference that he did not sign? It was suggested that his signature to the original memorandum of the terms of sale, as submitted to the meeting of the 9th October, 1908, was a sufficient signature. But those were not the terms finally agreed upon and embodied in the agreement of the 29th October, 1908; and there is no evidence of any memorandum containing the terms of the final agreement being signed by him or his agent prior to the 24th November, 1908; and therefore it seems to me that, up to the 24th November, 1908, the agreement, though otherwise perfectly valid, could not have been enforced against Lord Dunalley if he chose to rely on the Statute of Frauds. But it is well settled that a contract for sale of land, if otherwise valid, signed by one party, is binding on him, though not signed by the other; and therefore it seems to me that the agreement of the 29th October, 1908, was binding on the tenants who signed it, though it was not signed by Lord Dunalley; and even if there were nothing more in the case, I am inclined to think that, if the sale of the holdings of the tenants who signed were carried through, and a separate estate declared in respect of them, that would be the sale of an estate under an agreement for purchase entered into on the 29th October, 1908, within the meaning of section 48, sub-section 3, of the Act of 1903. I think it is not immaterial that the words of sub-section 3 are agreements for *purchase*, not agreements for *sale*.

Now, so far, I have dealt with the case without referring to

anything that occurred after the 24th November, 1908. But the case further states that "on the 15th January, 1909, Mr. C. H. Maude, the agent of Lord Dunalley, wrote a letter to the secretary of the Estates Commissioners, of which the following is a copy :—

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' In this estate the landlord and the tenants entered into an agreement for the sale and purchase of this estate prior to the 31st day of October, 1908, and I beg to enclose you the terms agreed on, signed by Lord Dunalley, finally settled on the 9th October, 1908, and the agreement signed by the tenants, dated the 29th October, 1908. It was found impossible to get a survey made of the estate in time, and we did not like to get the agreements signed on the forms prescribed until we had the maps and areas, as it might have given the Estates Commissioners a lot of extra trouble, and the agreements would have necessarily been prepared in a great hurry. Lord Dunalley is most anxious the tenants should get the benefit of the agreement, as they get off a considerable amount of rent, and a considerable reduction in their annual payments; but if the agreement falls through, they must pay up the rent and continue to pay rent instead of interest. The maps and survey have been completed by Mr. George Garvey, C.E.; and, if the Estates Commissioners will accept the agreements as of the 31st October, 1908, they will be completed at once and lodged; but if not, the whole agreement will fall through. Should the Estates Commissioners feel any difficulty, Lord Dunalley would ask that the opinion of the Judicial Commissioner should be taken on the matter, as it is of very grave importance to the landlord and his tenants.' "

On the 15th February, 1909, the assistant-secretary of the Estates Commissioners wrote to Mr. C. H. Maude, in reply to the said letter of the 15th January, 1908, a letter, of which the following is a copy :—" With reference to your letter of the 15th ulto., I am directed by the Estates Commissioners to return herewith the preliminary agreement, dated the 29th day of October, 1908, which accompanied same, and to state that they are not prepared to express any opinion on the question of law raised in your letter under reply; but if formal proceedings for sale are instituted before them in the usual way, they will, on the application of the owner, refer any questions of law arising on the facts for the

Wylie, J. decision of the Judicial Commissioner, under section 23 (1) of the
1909. Irish Land Act, 1903."

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In accordance with the suggestion of said letter of the 15th February, 1909, and by leave of the Estates Commissioners, formal proceedings have been instituted in the said matter by the lodgment of an originating application by Lord Dunalley.

Now, the letter of the 15th January, 1909, appears to me to be a clear admission, under the hand of the agent of Lord Dunalley, that he and his tenants had, in the month of October, 1908, entered into an agreement for the sale and purchase of their holdings, upon the terms set forth in the agreement signed by the tenants on the 29th October, 1908, and that letter seems to me, beyond all doubt, a sufficient memo. of the agreement, within the 4th section of the Statute of Frauds. But that memorandum does not constitute the agreement: it is merely the evidence required by the statute to enable the prior existing agreement to be proved against Lord Dunalley in an action brought upon it, or to enforce it; and the agreement was one entered into, not at the date of the memorandum, in January, 1909, but in October, 1908. Therefore, it seems to me that, at any time after the 15th January, 1909, the agreement signed by the tenants on the 29th October, 1908, could have been enforced against Lord Dunalley, subject, of course, to any right of rescission he might have under the 12th clause. But, for the purpose of answering the questions submitted to me, I do not think it is necessary to decide whether the agreement of the 29th October, 1908, could have been enforced by action against Lord Dunalley, either prior to the 24th November, 1908, or at any later period. The Statute of Frauds does not make the agreement void, or in any way affect its validity. The tenants who signed are bound, and Lord Dunalley is also bound, if he does not choose to rely upon the statute, and I am only asked now to decide by anticipation what Lord Dunalley's rights as regards bonus will be in the event of that agreement for purchase being carried out. With reference to the first and second questions put to me, I think it better not to answer them separately in the form in which they are put. In framing my answer I have to bear in mind that only the tenants who signed the agreement of the 29th October, 1908, are bound by it, and that the bonus, under section 48, is only

payable in respect of purchase-money advanced on the sale of estates, *i.e.*, of lands which the Estates Commissioners declare fit to be regarded as separate estates for the purpose of the Act.

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I have not yet been called upon to decide the question whether, if a declared estate comprised some holdings, the agreements for the purchase of which were entered into after the 24th November, 1908, the bonus would be payable partly at 12 per cent. and partly at 3 per cent., or entirely at 3 per cent., and I hope I never shall be. But, having regard to the difficulties that might arise in a case of that kind, I think great care should be taken in carrying out this sale to avoid such difficulties.

My answer to the first and second questions, combined in one, is this :—If the agreement of the 29th October, 1908, for the purchase of their holdings by the tenants who signed it, or some of them, is carried out, and if the Estates Commissioners declare the lands comprised in those holdings fit to be regarded as a “separate estate” for the purpose of the Act of 1903, and sanction the advance of the purchase-money, ascertained according to the terms of said agreement, a bonus at the rate of 12 per cent. on the amount so advanced will be payable to the vendor.

As regards the third question, it seems to me that the necessity for signing an agreement for purchase according to the prescribed form is only a matter of procedure and convenience. The agreement of the 29th October, 1908, is certainly not in a form that could be conveniently fiat^d; but if the Estates Commissioners chose to proceed by vesting order instead of fiat, I do not see any legal difficulty in carrying out the agreement of 29th October, 1908, in that way, as soon as the areas and boundaries of the holdings are ascertained and checked and the prices fixed, without any further formal agreement; and, therefore, in my opinion, any formal agreements now signed by any of the tenants who signed the agreement of the 29th October, 1908, for the purpose merely of carrying that agreement out, should be dated as of that date, otherwise difficulties may arise, not only under the Act of 1903, but under section 35 of the Act of 1896.

Therefore, the answer I will give to question 3 is—Yes; so far as they are signed by tenants who signed the agreement of the 29th October, 1908, prior to the 24th November, 1908.]

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The curial part of the order was as follows :—

“THE COURT, in answer to the first and second questions of law, doth declare that if the agreement, dated the 29th day of October, 1908, for the purchase of their holdings by the tenants who signed it, or some of them, is carried out, and if the Estates Commissioners declare the lands comprised in those holdings fit to be regarded as a separate estate for the purpose of the Irish Land Act, 1903, and sanction the advance of the purchase-money, ascertained according to the terms of said agreement, a bonus at the rate of 12 per cent. on the amount so advanced will be payable to the vendor. And the Court doth answer the third question of law in the affirmative, so far as the purchase agreements are signed by the tenants who signed the agreement dated 29th October, 1908, prior to the 24th November, 1908.”

J. E. W.

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July 30.

The Treasury appealed (1).

Serjeant O'Connor, K.C., and Dudley White, for the Treasury :

The agreement of the 29th October, 1908, was not such a binding agreement as was contemplated by section 48 of the Irish Land Act, 1903. It was not signed by Lord Dunalley, so as to be binding upon him, until after the 24th November, 1908, on which day the Treasury Revision Order was published; and the Estates Commissioners have found as a fact that Lord Dunalley “is unwilling to go on with it” unless he can rely on receiving the 12 per cent. bonus. Clauses 7 to 11 of the agreement could not be enforced by any person. Even if the agreement could be enforced as a whole by Lord Dunalley against the tenants who signed, it could not be enforced against him. There is no evidence that he ever assented to or accepted it: *Boys v. Ayerst* (2). Mr. Maude’s letter of the 15th January, 1909, was written long after the date of the alleged binding agreement.

We submit that the “agreements for the purchase of estates”

(1) In the Court of Appeal, before THE LORD CHANCELLOR, THE MASTER OF THE ROLLS, and FITZGIBBON, L.J.

(2) 6 Madd. 316.

mentioned in sub-section 3 of section 48 must be agreements which, in at least all essential points, including the signature of the vendor, follow the prescribed form, otherwise the Treasury would be at the mercy of every vendor who contended that there was a parol contract existing at the crucial date, which had been acted on by the parties, and followed up by agreements in the prescribed form.

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Ronan, K.C., and S. L. Brown, K.C., for Lord Dunalley :—

There has been a confusion between the date of the contract and that of the coming into existence of evidence which made it possible to enforce the contract. Here there was a valid contract between Lord Dunalley and the purchasing tenants, reduced into writing prior to the 24th November, 1908, and that is sufficient to entitle Lord Dunalley to the 12 per cent. bonus. In the words of Lindley, L.J., in *In re Hoyle* (1), "the statute does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it." The letter written by Mr. Maude on the 15th January, 1909, is a sufficient note or memorandum to satisfy the statute; and it is immaterial that the letter came into existence after the contract: *Bailey v. Sweeting* (2). The letter had a retroactive effect, rendering the contract, which was already a valid one, effective. That Lord Dunalley was always both willing and anxious to carry out the contract is clear.

Henry, K.C., for the purchasing tenants.

THE LORD CHANCELLOR :—

The question which we have to decide in this case is not one of general application, nor whether agreements resting in parol only are or can be agreements entered into within section 48, sub-section 3, but whether this agreement in writing of the 29th October, 1908, between Lord Dunalley and his tenants, applying to it all the admissions and statements of fact contained in the case submitted to Mr. Justice Wylie, was an agreement entered into

(1) [1893] 1 Ch. 84, at p. 97.

(2) 9 C. B. (N. S.) 843, at p. 857.

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prior to the 24th November, 1908. It was not signed by Lord Dunalley; but the first question in the case, and the crucial one, is—whether it was accepted and adopted by him prior to the 24th November, 1908. Serjeant O'Connor contended that it was not, as a fact.

In October, 1908, there was a common anxiety on the part of Lord Dunalley and his tenants to have purchase agreements entered into; but as it was impossible to have them completed in the prescribed form before the 24th November, 1908, they adopted a form of agreement with the tenants *in globo* of the date of 29th October, 1908. In my opinion, the agreement contains on its face conclusive evidence of an agreement in fact by Lord Dunalley as of that date; and the recital in it shows the desire and agreement of both parties, not only that there should be a sale, but one in the nature of a binding contract having existence before the 1st November, 1908, which, as a consequence in law, would give the vendor a bonus of 12 per cent.

The agreement recites—[His Lordship read the agreement, as given *ante*, pp. 342–345]. Great reliance is placed on the statement in the case:—"But Lord Dunalley is unwilling to go on with the sale unless he can rely on receiving the bonus on the purchase-money at the rate of 12 per cent." That does not mean that Lord Dunalley is unwilling to carry out the agreement of the 29th October, but that he is anxious to carry out its terms, which would give him all he desired, and that it would be against his will that there should be any other result. Therefore, we have it that all parties agreed that all parties should be treated as bound as of that date, the 29th October. The question of the evidencing of that contract by the signature of Lord Dunalley is not the material point.

Then, Serjeant O'Connor said there was no agreement because it was not an agreement in the prescribed form in an essential particular, viz., its not being signed. That is the same question, unless it involves that any agreement within section 48, sub-section 3, must be "in the prescribed manner"; but the section does not say this. It only requires the existence of an agreement, and it would make the Act unworkable if it were a condition precedent that there should be one in the form prescribed; and

instances were mentioned during the argument which would show that. It is not necessary, I think, to refer to anything that took place on the part of Lord Dunalley or his agent subsequent to the 29th October. If it were, I think sufficient evidence is furnished of what would give operative effect in law to the agreement of the 29th October, and it had, to use the language of Erle, C.J., in *Bailey v. Sweeting* (1), a "retroactive effect."

In this case, however, the case stated proceeds on there being an agreement in fact of both on the 29th October. It is not necessary to consider the question whether Lord Dunalley could be sued on the agreement. It has existence independently of the Statute of Frauds, which does not avoid it. In result, therefore, I think the decision of Mr. Justice Wylie was right.

The answers in the order of Mr. Justice Wylie to Nos. 1 and 2 are, we think, quite correct; but as regards the answer to No. 3, we shall slightly modify it in the way that will appear in our order, and will be read by Lord Justice FitzGibbon.

THE MASTER OF THE ROLLS:—

I concur. According to my view the facts stated in the case are absolutely clear. They point to a concluded agreement between the landlord and his tenants, reduced into writing, and signed by the tenants, at the request of the landlord or his agent, on the 29th October, 1908. The terms of the agreement of the 29th October, 1908, are, as the Lord Chancellor has said, demonstration that there was a concluded agreement as of that date, within the meaning of the law regulating agreements for the sale of land.

I do not think that the Statute of Frauds has any operation upon the case. Both landlord and tenants are applying to the Land Commission to carry out the very sale the terms of which are embodied in that agreement of 29th October.

It is stated in the case, relied on by Serjeant O'Connor, and pressed on the Court by Mr. White, that Lord Dunalley is unwilling to go on with the sale "unless he can rely on receiving the bonus on the purchase-money at the rate of 12 per cent."; but that must be read in connexion with the whole of the paragraph,

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which states that "Lord Dunalley and the said tenants are most anxious that the said sale should be carried out."

What stronger evidence could there be of the willingness, and not unwillingness, of Lord Dunalley that the sale should be carried out? But Lord Dunalley is unwilling to go on with it unless he can rely on receiving the bonus on the purchase-money at the rate of 12 per cent.; or, in other words, he is most anxious, as the tenants are most anxious, that the agreement should be carried out in its entirety, and that one of the terms—for I call the recital as to the agreement being entered into within five years from the commencement of the Irish Land Act, 1903, one of the terms—should be given effect to. To treat that as a statement by the Estates Commissioners that Lord Dunalley was unwilling to accept and adopt the agreement, or that he had not done so, is, I think, pushing the use of what may be a somewhat indefinite phrase too far.

With regard to the question of the prescribed form, personally I am not disposed to attach attention to it. Section 48 commences—"For the purpose of aiding the sale of estates under this Act, the Land Commission may, in the prescribed manner and at the prescribed time, out of advances by the National Debt Commissioners from the said fund, pay to the vendor of each estate sold a sum calculated at the rate of 12 per cent. on the amount of the purchase-money advanced under the Land Purchase Acts." But when we come to sub-sect. 3, there is no mention or suggestion of a "prescribed" agreement. [His Lordship read the sub-section.]

The matter is left at large, and the Courts have to construe the words "agreements entered into" after the date of the publication of the Treasury revision in the light of the ordinary principles of law and construction applicable to agreements for the purchase of estates. To say that the section required that all the very strict provisions which the Estates Commissioners, in order to avoid complications and difficulties, embodied in the form that was prescribed by them for the purposes of their Court, should be complied with, is, I think, incorrect.

In my opinion, the decision of Wylie, J., was founded upon facts, which were stated in the case itself, and his view of the law was eminently sound.

FITZ GIBBON, L.J.:—

Subject to an alteration of the form of the answer to the third question, Wylie, J., appears to me to have dealt fully and correctly with the question of law upon which this Case was really intended to be submitted—namely, the efficacy, for the purposes of the Land Purchase Acts, of a purchase-agreement, the terms of which have been reduced to writing, but the document which contains them has been signed by one party only, though both parties are *ad idem*, and have made and acted on the agreement itself.

Upon this question, I adopt the judgment of Wylie, J., and I concur with the Lord Chancellor and the Master of the Rolls. I have always understood that, in such a case, an agreement may be made which the Statute of Frauds does not avoid, though it may prevent its being enforced by suit or action.

Wylie, J., does not refer at all to the point which occupied most of Serjeant O'Connor's argument in this Court. I do not know that it was made below. That point, so far as I can understand, raises a question of pure fact, and turns upon the construction or meaning of the Case. We have no jurisdiction to entertain such a question; but if we had, it is only fair to say that, in my opinion, it would be completely answered by the Case. Not only does Serjeant O'Connor's argument contradict the Case, but if it were correct, Lord Dunalley would be "stated out of Court" on the facts, and the "question of law" would never arise.

The contention is that, at the crucial date there was no agreement, because Lord Dunalley was not then willing to carry out the terms of the "preliminary" agreement of October 29, 1908. The Case says:—

"Lord Dunalley and the said tenants are most anxious that the said sale" (*i.e.*, a sale on the terms of the preliminary agreement) "should be carried out; but Lord Dunalley is unwilling to go on with it" (*i.e.*, the sale on those terms) "unless he can rely" (*i.e.*, so far as any agreement of the parties can enable him to do so), "on receiving the bonus on the purchase-money at the rate of 12 per cent."

I read that clause as a plain declaration that both parties are, and always have been, anxious to carry out the sale upon the terms upon which they have agreed, and which are embodied in

Appeal. the document signed by the tenants, but one of them—Lord
1909. Dunalley—is unwilling to go on with any other agreement. He
In re will not go on with this one unless he can get it performed, and
DUNALLEY'S he will not go on with any variation of it. If the words meant
ESTATE. anything else they would not be true; if Lord Dunalley was not
FitzGibbon, willing to perform the agreement embodied in the document he
L.J. should have been put out of Court on the facts, and the Case
should not have been stated at all.

We all approve of the terms in which Wylie, J., has framed the answer to the first and second questions together. No agreement of the parties could ever ensure the reception by Lord Dunalley of the bonus at the rate of 12 per cent., or at any other rate; and it is perfectly right that the answer to the two questions should be conditional upon the action of the Estates Commissioners in declaring the lands to be a separate estate, and in sanctioning the advance of the purchase-money ascertained according to the terms of the agreement. I am not aware that we have any power to anticipate, or to prevent, any other difficulties which the Land Commission may make in carrying out the agreement. The words "sufficient to entitle Lord Dunalley to the bonus" can only mean sufficient to entitle him so far as the terms of the agreement for sale can bring him into the position of a vendor to whom the provision for payment of the 12 per cent. bonus applies. If he does not get it, then the question will arise whether he can not rescind the agreement, or whether it will not fall to the ground as incapable of performance. That is a question of wide application. It has not been raised here; it might arise in any case in which an advance is refused or reduced, and we ought not to anticipate it now.

I do not regard the change which we propose to make in the third question as merely formal. I have often expressed my opinion about provisions in Acts of Parliament which deem things to be what they are not, and what they never can be. *Naturam expellas furca, tamen usque recurret.* In spite of statutes, things will not work as if they were something different from what they are, and endless difficulties arise in giving effect to hypothetical legislation. Here we have a hypothetical question. The Estates Commissioners ask—

"Whether purchase-agreements, if signed *now in the prescribed form*, would be deemed to have been entered into prior to 24th November, 1908?"

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I do not think that we ought to answer that question categorically; and I do not approve of ante-dating any documents that may be signed "now" or hereafter. By whom, and when, "*would*" such documents be deemed to have been signed at some time other than their true date?

I am not sufficiently familiar with the machinery of the Purchase Acts to know whether the sale of this estate can be carried out without the signing by the parties of any further document. Wylie, J., seems to think that it can. If so, the third question need not be answered at all.

Our view is this—We hold that the agreement of October 29, 1908, is a purchase-agreement sufficient to answer the terms of the section enabling the vendor to obtain the 12 per cent. bonus, if he is in other respects entitled to receive it. Any acts subsequently done to carry out that agreement, whether by fiat or by vesting order, or by signing more formal documents, will only be acts done to implement the contract which already exists, which we hold to be sufficient, and which is not to be altered. The Master of the Rolls has already, in *Wilson's Estate* (1), dealt with the question of the date from which interest becomes payable in lieu of rent when parties have entered into a binding contract for sale, before signing "purchase-agreements in the prescribed form," and he appears to have decided this very point.

We propose to answer the third question by saying that in the case of any tenants who signed the agreement dated October 29, 1908, prior to November 24, 1908, purchase-agreements in the prescribed form, if now signed in accordance with the terms of that agreement, and for the purpose of carrying it out, will take effect as of the date of the agreement for sale, viz., the 29th October, 1908.

This is the date of the real and operative purchase-agreement in the Case; which, in my opinion, is the simple and ordinary case of a binding agreement for the sale of land, intended to be

Appeal. followed by a regular conveyance, and the appellants' argument
1909. is that the date of the conveyance is the date of the agreement.

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Solicitor for the Treasury: *W. G. Towers.*

Solicitors for the vendor: *A. O'Connor & Son.*

Solicitor for the tenants: *James O'Brien.*

R. ST. J. C.

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June 10, 15.

BEAMISH v. WHITNEY.

(1907. No. 1271.)

Mortgage—Statute of Limitations—Acknowledgment in writing after bar of statute.

Certain lands were subject to a mortgage. Since 1884 no payment had been made by the mortgagor in respect of interest or principal. The mortgagor died in 1905, and his executrix, in Schedule B, set out the mortgage as an existing incumbrance, but did not set it out in Schedule A, among the debts due by the deceased.

In an action by the assignee of the interest of the mortgagee against the executor of the mortgagor for the administration of the real and personal estate of the mortgagor:—

Held, that the mortgagee's title to the land being after the expiration of the statutory period extinguished, the subsequent acknowledgment, assuming it to be a good acknowledgment, was of no avail to revive either the charge on the land or the covenant in the mortgage.

TRIAL OF ACTION.

Henry Hungerford Whitney was, in 1865, and prior thereto, possessed of an estate in fee-simple in the lands of Nohoval, Kinsale, County Cork.

By an indenture of mortgage dated 2nd November, 1865, Henry Hungerford Whitney granted part of the said lands to Margaret Heard, to secure the repayment of the sum of £500 with interest at 5 per cent.

By an indenture dated 28th January, 1875, Margaret Heard assigned her interest in the mortgage to William Whitney, father of Henry Hungerford Whitney.

By his will, dated 31st July, 1877, William Whitney be-

queathed all his property to his daughter, Anna Daunt Whitney, whom he appointed his executrix. He died on the 20th August, 1889.

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Henry Hungerford Whitney predeceased his sister, Anna Daunt Whitney, in the year 1905, and probate of his will was granted to his widow, Jane Whitney (the defendant), on 28th July, 1906, whom he made his universal legatee, and to whom he devised the said lands of Nohoval. In the schedule of assets prepared for the purposes of probate, Mrs. Whitney set out the mortgage debt of £500, under Schedule B, as a subsisting incumbrance for the purpose of duty deductions.

Miss Anna Daunt Whitney died on 28th November, 1906, and by her will she bequeathed the said mortgage for £500 to Dr. Thomas Beamish (the plaintiff), and appointed the plaintiff and Catherine Baldwin Beamish executor and executrix of her will and codicil.

There was no payment of money in respect of interest on the mortgage since 1884; but the plaintiff alleged that in lieu of money, certain bags of potatoes had been annually sent by the mortgagor to the mortgagee.

The plaintiff brought the action as a creditor of Henry Hungerford Whitney, deceased, against the defendant as executrix, universal legatee, and devisee under the will of the said Henry Hungerford Whitney, to have the real and personal estate of the said Henry Hungerford Whitney administered under the order and direction of the Court.

The defendant by her defence pleaded that the sending of the potatoes was not done by way of payment or acknowledgment of the mortgage debt, and submitted that, in law, the inclusion of the amount of the mortgage in the deductions in Schedule B, was not an acknowledgment within the Statutes of Limitation, and relied on the Statutes of Limitation as a defence to the action.

Serjeant O'Connor, K.C. (with him *Jefferson, K.C.*, and *Hon. Cecil Atkinson*), for the plaintiff:—

In proceedings against land, the acknowledgment must be given to the person entitled to the charge: Real Property Limitation Act, 1833 (3 & 4 Wm. 4, c. 27), section 40. The

Ross, J. present case is governed by the Act 3 & 4 Wm. 4, c. 42, sect. 5.
 1909. — If necessary we can show that the acknowledgment in the schedule
BEAMISH of assets is an acknowledgment to the person entitled to the debt,
v. because it is a public document given to all the world, on the
WHITNEY. strength of which the person gets relieved from duties due to the
 State. The admission of a debt by an insolvent in his schedule
 has been held an acknowledgment within section 40 : *Barrett v.*
Birmingham (1). In that case the acknowledgment was made
 before the statutory period had elapsed. Admissions by a party
 to a suit were held an acknowledgment within section 40 : *Blair*
v. Nugent (2). So also an acknowledgment of a debt in the will
 of the debtor : *Millington v. Thompson* (3). So also a statement
 in a probate affidavit : *Jenkins v. Emmett* (4). So also an entry
 in an administrator's inventory : *Smith v. Poole* (5). But we are
 not proceeding against the lands ; we are suing on the covenant
 for the debt. The present case is governed by section 5 of the
 Civil Procedure Act, 1833 (3 & 4 Wm. 4, c. 42), which does not
 require the acknowledgment to be given to the creditor : *Moodie*
v. Bannister (6).

[Ross, J. : Has it not been held that an acknowledgment must imply a promise to pay ?]

Before Lord Tenterden's Act (9 Geo. 4, c. 14), it was held that an acknowledgment gave a new cause of action. Lord Tenterden's Act provided that the acknowledgment should be in writing and amount to a promise to pay. The Act of 1833 dealt with specialty debts which did not require a promise to pay ; but the Act proceeded on the presumption that the debt had been paid, if no payment of interest had been made within the time limited.

As to the question whether an acknowledgment must be given before the debt became statute-barred : it has been decided that the words "in the meantime," in section 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), include a period between the time of the commencement of the action or suit and a time when the remedy for the debt would otherwise have

(1) 4 Ir. Eq. R. 537.

(2) 3 Jo. & L. 658, 674.

(3) 3 Ir. Ch. R. 236.

(4) 95 L. T. (N. S.) 755.

(5) 12 Sim. 17.

(6) 4 Drew. 432.

been barred: *In re Clifden*, *Annaly v. Agar-Ellis* (1), *Harty v. Davis* (2), *Becher v. Delacour* (3). ROSS, J.
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[ROSS, J.: If *Sutton v. Sutton* (4) is law, can you maintain your action? It decides that if the remedy on foot of the lands is gone, then the remedy on foot of the personal covenant is gone also.] BEAMISH
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It so decided, but it never decided that the debt on foot of the personal covenant could not be revived. *Sutton v. Sutton* (4) decides that the charge on the lands cannot be set up again, but there is no decision that the debt may not be revived. The lands are discharged as if there was a reconveyance by the mortgagee to the mortgagor. That follows from section 34 of the Real Property Limitation Act, 1833 (3 & 4 Wm. 4, c. 27), which extinguishes the right to the land, not the right on the covenant. [He also cited *Read v. Price* (5).]

H. D. Conner, K.C. (with him *George M'Sweeney*), for the defendant:—

This action is substantially an action to raise the mortgage out of the lands. The action is in the teeth of *Sutton v. Sutton* (4). The mortgage is gone and cannot be revived. When the mortgage is gone the covenant is also gone. An acknowledgment may revive the remedy where the cause of action exists, but the cause of action here has ceased to exist. In a personal action the inability to sue is removed by the acknowledgment. When it appears affirmatively that there has been no payment, the acknowledgment will not revive the charge: *Fearnside v. Flint* (6) follows *Sutton v. Sutton* (4), and is the case of an acknowledgment. The acknowledgment in the present case is not an acknowledgment of a debt. Schedule B deals with charges on lands; Schedule A deals with debts of the testator. It does not follow that because a charge is inserted in Schedule B, a debt is therefore due by the deceased. The incumbrance might have been created by the deceased's predecessor in interest. There is no admission of a debt of the testator, or promise to pay. The most is that it is an

(1) [1900] 1 Ch. 774.

(2) 13 Ir. L. R. 23.

(3) 11 L. R. Ir. 187.

(4) 22 Ch. D. 511.

(5) [1909] 1 K. B. 577.

(6) 22 Ch. D. 579.

Ross, J. admission of a charge on the lands which the personal representa-
 1909. tive could not make.

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WHITNEY.

George M' Sweeney :—

The schedule was put in by my client as executor, and not as beneficiary. She has nothing to do with the lands. The debt is not inserted among the debts of the testator, and, therefore, the schedule is no admission that the personal property is liable to the debt. Schedule B is merely an acknowledgment that the charge exists, but any acknowledgment made to bind the real estate is ineffectual, as the charge is gone. This is not an admission against the assets, and the executor has no power to bind the real estate.

Jefferson, K.C., in reply, cited *Harlock v. Ashberry* (1); *In re Clifden*; *Annaly v. Agar-Ellis* (2).

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Ross, J. :—

This is an action for the administration of the real and personal estate of Henry Hungerford Whitney, deceased.

The plaintiff claims as a creditor. The defendant is sued as executor and universal legatee and devisee under the will of the deceased.

By a deed of 2nd November, 1865, the deceased conveyed his fee-simple estate by way of mortgage to Margaret Heard to secure £500. The mortgage security became vested in Anna Daunt Whitney, sister of the mortgagor. No interest has been paid on foot of the mortgage since the year 1884.

Under the circumstances the mortgage would be barred; but the defendant in her accounts for the assessment of probate duty included this mortgage in Schedule B.

It is contended that this is an acknowledgment that keeps the mortgage effective. I do not decide that this is a good acknowledgment, but I will assume it to be a good acknowledgment for the present. It is admitted that in so far as the realty is affected the charge is barred by the statute when once the statutory period

(1) 19 Ch. D. 539.

(2) [1900] 1 Ch. 774.

has elapsed, and that it cannot be revived by any acknowledgment. But it is contended, in the case of the covenant contained in the mortgage deed, that even after the time has expired the covenant can be brought into full force and effect by an acknowledgment.

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The full facts are set out in a summons matter under Gen. Ord. LV., Rule 7, reported in [1908] 1 I. R. 38, heard before Mr. Justice Barton. As a question of fact was raised, the Judge decided that he could not dispose of the matter, and that it could only be determined in an action.

The attempt of the plaintiffs to prove payment of interest by the mortgagor sending certain bags of potatoes has been quite futile. The learned Judge holding that the summons was in the nature of an action for foreclosure, and therefore an action to recover land, dismissed it, inasmuch as the plaintiff's title to these lands was extinguished. The plaintiff now seeks to get at the lands in an indirect way, by reviving the covenant and setting up a debt that would entitle him to have both real and personal estate realized.

The case of *Sutton v. Sutton* (1) decides that section 8 of the Real Property Limitation Act of 1874 has the effect not only of barring actions and suits for the recovery of money charged on land, but that it applies also to the personal remedy on the covenant in the mortgage deed. No action of any kind or description can be maintained, after the expiration of the statutory period, to enforce the charge on the land or to make the personal remedy effective.

It is admitted that no subsequent acknowledgment can revive the charge on the land. But it is contended that this is effected by section 34 of the 3 & 4 Wm. 4, c. 27, which has the effect of extinguishing the mortgagee's whole title to the land, and not merely his remedy against the land.

It is contended that there is no section in any of the Statutes of Limitation that in the same way affects the covenant, and that therefore it can be revived by a subsequent acknowledgment. It is contended that a decree can be made in a creditor's suit for the

(1) 22 Ch. D. 511.

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administration of the real and personal estate, and that the lands can be sold to satisfy the debt.

In this case the executor who has given the acknowledgment is also the devisee—that is a mere accident. We must test the matter by assuming a case where the land is devised to a person other than the executor, and the absurdity becomes at once apparent. The land is freed from the charge by the effect of sect. 8. The executor has no power of dealing with the lands in any way; but, by giving an acknowledgment, it is contended he can put it in the power of the creditor to realize his entire debt out of the lands.

The absurdity is too great to admit of the soundness of such an argument. The section, though it is to be found in a real property statute, deals with personalty; that is now beyond dispute. It deals with any legacy, and it deals with personal covenants.

We have here the case of the same sum of money secured by two things, the land and the personal liability. The greater security is the land and the lesser the personal liability. The section in conjunction with the former legislation not merely suspends the remedy, but extinguishes the right in the case of the security on the land. It is impossible to conceive any reason why its action should be different in the case of the lesser security. The only reasonable conclusion at which we can arrive is, that it destroys the mortgagee's right altogether, that it wipes out the debt, and that both the greater and the lesser remedy perish along with the debt.

I am therefore of opinion that the entire action is unsustainable, and that it ought to be dismissed with costs. Nothing I have said at all conflicts with the judgments of Barton, J., in *Beamish v. Whitney* (1), or with the judgment of Byrne, J., in *In re Clifden*; *Annaly v. Agar Ellis* (2).

Solicitors for the plaintiff: *Wynne & Wynne.*

Solicitor for the defendant: *Arthur Julian.*

D. M. S.

(1) [1908] 1 I. R. 38.

(2) [1900] 1 Ch. 774.

HOSFORD v. O'REGAN.

(1908. No. 528.)

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(for Barton, J.)
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June 14, 15.

Labourers Acts—Improvement scheme—Exchange of plot—Part of old plot included in new—Lodgment of purchase-money in bulk sum—Right of entry—Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59), s. 16—Labourers (Ireland) Act, 1896 (59 & 60 Vict. c. 53), s. 4—Trespass—Injunction.

Where, under section 16 of the Labourers (Ireland) Act, 1886, the Local Government Board have authorized an exchange of any site and plot, included in a scheme, for another site and plot of equal area, such exchange is not invalidated by the inclusion in the new site and plot of a portion of the old.

The provisions contained in section 4 of the Labourers (Ireland) Act, 1896, under which the sanitary authority may enter upon the lands comprised in an order, are not satisfied by the lodgment in the Bank of Ireland in one bulk sum of the sum directed by the Local Government Board to be lodged in respect of the scheme. To enable a sanitary authority to enter upon any plot comprised in a scheme, the specified sum authorized by the Local Government Board in respect of such plot must be separately lodged.

Where a Provisional Order has been made by the Local Government Board at the request of a Rural District Council, sanctioning a scheme which has been acted on, the Local Government Board is seised of jurisdiction, and can, under sect. 16 of the Labourers (Ireland) Act, 1886, amend the scheme, although the resolution requesting the amendment is subsequently rescinded, and although the Order has become confirmed by the efflux of the statutory period.

TRIAL OF ACTION.

The plaintiff in this case was the owner and occupier of certain lands situated at Rathenaltig, Shanbally, in the County of Cork.

By a Provisional Order of the Local Government Board, made in 1906, which became absolute under the statute, the Cork Rural District Council were authorized to carry out an improvement scheme, whereby it was proposed to acquire the several plots set out in the schedule to the Order. Among the plots comprised in the schedule were two plots which formed part of the plaintiff's lands.

Ross, J. They were identified by reference to the deposited maps and particulars as 1241 and 1250 on the Ordnance Sheet 87.
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O'REGAN. On the 12th May, 1908, the Local Government Board made an order that the above-mentioned plots should be exchanged for two other plots numbered respectively 1241A and 1250A on the Ordnance Sheet. This order was made in response to a letter from the Solicitor of the Rural District Council, requesting leave to make the exchange, and forwarding a map showing the proposed exchange, which was marked by the owner of the lands. This exchange had been suggested by the owner on the ground that the plots as originally proposed would take up too much of the frontage, but that this could be obviated by deepening the plots. This was approved of by the Rural District Council; but no actual resolution to that effect appeared on the minutes of the Council, though a resolution to rescind a resolution approving of the exchange appears to have subsequently been brought forward and passed.

The area of the new plots was the same as that of the old; but each of the new plots included a portion of the old plots, for which they were exchanged.

The defendant was the contractor to the Rural District Council for the erection of the cottages to be erected in pursuance of the said scheme; and the plaintiff alleged that he refused to abide by the order of May 12, 1908, and the resolution of the Rural District Council in pursuance of which it was made, and had trespassed on the portion of the lands comprised in the old plots, but which were excluded from the new, by erecting and keeping erected a fence thereon, and depositing and keeping deposited building-materials thereon, and ploughing the sod.

The plaintiff claimed an injunction to restrain the defendant from trespassing on those portions of the plaintiff's lands which were comprised in the old plots, but excluded from the new, and an enquiry as to damages.

P. D. Fleming, K.C., and Drumgoole, for the plaintiff.

Healy, K.C., and The Hon. Cecil Atkinson, for the defendant:—

The words of section 16 of the Act of 1886 are "site and plot." The inclusion of a portion of an old plot in a new is not an exchange within the section, having regard to the language used ; the site must be altered as well as the plot, and the plot is all that is altered here. Therefore, on that ground the order authorizing exchange was invalid. Again, to enable an exchange to be made, the Local Government Board must be set in motion by a petition. Here no petition was presented at all. The Local Government Board can only authorize alteration of a scheme, and there is no scheme here. The order was late in point of time to be of any force or effect, inasmuch as prior to it, viz., in the month of **May**, 1907, the defendant was lawfully put in possession of the original plots by direction, and under the authority of the Council, and had built his labourers' cottages in addition to having erected the greater portion of the boundary walls and fences. Accordingly, the order of 12th May, 1908, was in excess of jurisdiction. It would be in effect reversing an order already made and confirmed, which the Local Government Board have no power to do. It should be borne in mind that the alleged resolution to alter the plots was expressly rescinded. The lodgment in the Bank of Ireland of the sum specified gives a right of entry under section 4 of the Act of 1896.

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For these reasons the entry of the defendants upon the lands was lawful, and there was no trespass.

Drumgoole, in reply :—

To say that the inclusion of a small portion of an old plot in the new would invalidate an exchange, would be to give a very narrow construction to the section. The order of the Local Government Board has nothing to do with area ; a site and plot really means a single unit. The lodgment in the Bank of Ireland of the specified sum in one bulk sum is not a sufficient compliance with the section. The specific sum authorized by the Local Government Board, in respect of a plot, must be separately lodged before an entry on the plot can be made. The order authorizing the exchange was made on the written request of the solicitor of the Rural District Council, which was a sufficient compliance with the Act. Once the Local Government Board had authority to make

Ross, J. the order for an exchange, a rescinding resolution of the Council
1909. cannot affect that authority.

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Ross, J. :—

June 15.

The only kindness I can do the parties is not to put them to any further delay and expense—I propose therefore to deal with the matter at once. In my opinion, as I intimated at the opening of the case, the whole matter in dispute depends on legal questions, and there is an admitted basis of fact on which these legal questions can be decided.

What I have to decide first is, what was the *status* of the plaintiff, and whether it is such as to enable him to maintain this action.

The facts of the case are these: this holding was a holding from which a tenant was ejected for non-payment of rent; and it passed into and remained in the landlord's hands for several years. It was proposed to sell it as a separate estate to the Estates Commissioners, and they dealt with it as such, selected the plaintiff as the person to be tenant-purchaser, and he was put into possession of these premises. He paid interest or rent, whatever it may be called, for his occupation, and he continued to do so from May 1st, 1907. From that time down to the present, he was in possession of the holding, which covers the entire period during which these works were carried on. Thus he would be entitled to maintain an action for trespass, unless the acts complained of were done under some legal right or license.

It appears that a Provisional Order was made by the Local Government Board, to take up possession of these two acres of the land alongside the road; and there was an arbitration. It was pointed out by the plaintiff, on the question of compensation, that the whole frontage of his holding would be taken. He suggested that the plans might be altered by the Council taking up less front and deepening the plots. This suggestion seems to have been taken up by the Rural District Council, and a resolution was passed that the original scheme should be altered accordingly. There is no minute on the books to this effect, but we find that some resolutions were afterwards moved by some of the members of the Council to rescind a resolution to

that effect, showing that in their minds there was a resolution in existence. Furthermore, there is the letter to the Local Government Board, requesting them to make the exchange in accordance with the wishes of the Sanitary Authority. That brings me to the legal question.

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I have much sympathy with a man like the defendant, who finds himself involved in questions of jurisdiction and the validity of orders of the authorities.

It is not disputed that these proceedings to take up the lands and to obtain a Provisional Order for that purpose were brought under section 12 of the Act of 1885. The Provisional Order was made in the month of September, and in the absence of any objection a Provisional Order becomes absolute in a month's time, and has the same effect as if it had been empowered by Act of Parliament. We must now see what that Provisional Order does. It does not vest the soil in anyone. The lands remain in the possession of the former owner. It is only after actual payment that the lands can be taken up. Section 13 of the Act contains provisions under which the Local Government Board might amend a Provisional Order made by them before the passing of the Act, and there are circumstances stated under which amendments might be made. There is nothing in that section that would apply to this case. These plots were not immediately taken up, but an order was obtained that an exchange might be made, and that brings me to the 16th section of the Act of 1886, under which the order giving liberty to make the exchange has been made.

I am against the contention put forward by Mr. Healy and Mr. Atkinson, that at a particular date, namely, in October, 1906, all power and authority on the part of the Local Government Board was gone. There was an absolute order that the lands should be taken up, but it was in the power of the Local Government Board under the power in the Act of 1886 to make an exchange of sites on certain conditions being complied with. That order was attacked not only on the point of time, which I have already dealt with, but also as regards the steps necessary to be taken to make an exchange. It was said that the order was bad on the face of it, because it does not state that a petition was presented by the sanitary authority as owner. The

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petition, however, is not required to be in any specified form. A request, or any application put forward by the sanitary authority, is quite sufficient. A request did come from the person who would naturally be the medium of communication, the solicitor of the Rural District Council, sending up with it a map marked and signed by the person in lawful possession, showing the exchange required, and on that the Local Government Board made an order.

It is quite clear that the solicitor was acting under the authority of the Board, and that the members of that Board believed that a resolution to that effect had been proposed. I am aware that the Rural District Council rescinded the resolution at a later date, but a rescission could not affect the petition when it had been acted on. That being so, I must hold the solicitor had authority to make the request, and that after that request the Local Government Board was seised of jurisdiction.

Then it is said that there must be a complete exchange of plots, and that if a bit of the original plot is included in the new plot, the whole exchange is bad. I think that the words "site and plot," in section 16, were used to represent the same unit. It seems a senseless interpretation to say that there could be no exchange, because a bit of an old plot was brought into the new. I hold that there is here a sufficient exchange of a new unit for an old unit. It is certified by the engineers that the area of this new site is the same as the old. Accordingly, I hold that the order of the Local Government Board was good, and that the defendant is in default.

There is another important question raised which, although it may not be strictly necessary for me to do so, I shall, however, decide. That question is whether the mere payment into the Bank of Ireland of the £7000 in bulk under the 4th section of the Act of 1896 sufficiently complies with the conditions in the Act as to entry upon the lands. Now, under the Lands Clauses Acts the law is that the purchase-money must be paid into Court, before possession can be lawfully taken. It is different in the case of the Defence Acts. Under those Acts the military authorities can take up the lands at once, as immediate possession may be necessary for the requirements of national defences.

Besides, in such a case, the owner has the security of the whole State behind him. Here new statutory provisions have been substituted. Before entry, the purchase-money must be paid into the Bank of Ireland. The section must be construed with the greatest strictness. What does the section say? [His Lordship read it.] The whole thing turns on the words "in like manner as if it were the purchase-money." That throws us back on the previous Acts. Under those Acts the money must be paid in respect of the particular lands taken, and not in one bulk sum for all the lands in the undertaking. The payment in of this large sum in bulk is not a sufficient compliance with the law. The authorities have no right to throw on the owner the obligation of keeping watch over the fund, and seeing that enough is left for him. The fund is not under the control of a Court; it is merely in bank. For this reason, also, I think the defendant was in effect a trespasser over the land, and every part of it, and has no answer to the plaintiff's claim.

I think Mr. O'Regan was acting *bona fide*, and under great difficulties; but the plaintiff has proved his case, and I shall give him an injunction as prayed for. I fix the damages at one shilling, and I award the plaintiff the costs of the action.

Solicitors for the plaintiff: *Bourke & Dorgan*.

Solicitors for the defendant: *Wynne & Wynne*.

J. MACM.

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Feb. 21.

MICHAEL M'MACKIN, DECEASED.

THE NORTHERN BANKING CO., LTD., v. M'MACKIN.

(1899. No. 675.)

*Dower—Administration of real and personal estate—Simple contract—
Creditors—Priority—3 & 4 Wm. 4, c. 104—3 & 4 Wm. 4, c. 105, s. 5.*

Notwithstanding the Administration of Estates Act, 1833 (3 & 4 Wm. 4, c. 104), and sect. 5 of the Dower Act, 1833 (3 & 4 Wm. 4, c. 105), the widow's right to dower has still priority over mere creditors of a deceased husband.

Spyer v. Hyatt (20 Beav. 621) and *Jones v. Jones* (4 K. & J. 361) followed.

ADJOURNED SUMMONS.

This was an action brought by the Northern Banking Company, Limited, as creditors to administer the real and personal estate of Michael M'Mackin of Kilcourty, in the county of Tyrone, who died on September 12th, 1896, intestate. The defendants were Anne M'Mackin, his widow and administratrix, and Rose M'Mackin, his daughter and heiress-at-law. On November 13th, 1899, an order was made on the application of the plaintiffs, who were simple contract creditors of Michael M'Mackin, for the administration of his real and personal estate. A stay was put on the inquiry as to real estate, which was removed on November 11th, 1902. Michael M'Mackin left real estate out of which his widow was entitled to a rentcharge of £50 for her life, and also to dower. By indentures, dated September 3rd and September 10th, 1900, respectively, Anne M'Mackin mortgaged this rentcharge and her dower, and also certain policies of assurance on her life, to Joseph Abbott, to secure repayment of the sums of £200 and £80. The personal estate was insufficient to pay the simple contract debts, which amounted to £1737. A sum of £434 5s. 5d. was due to Joseph Abbott, on foot of the said two mortgages. The real estate, portion of which was subject to a mortgage for £2500 from the said Michael M'Mackin to William Stewart, was being sold by order of the Court. The

plaintiffs, on behalf of the simple contract creditors, claimed priority over Anne M'Mackin's right of dower, and accordingly a summons was taken out on January 9th, 1908, by the plaintiffs, to have it decided whether or not the dower of Anne M'Mackin, out of the lands of Edergole and Drumachrin, ranked in priority over the simple contract debts of Michael M'Mackin. The summons was adjourned into Court, and came on for hearing on February 21st, 1908.

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William Moore, K.C., for the plaintiffs:—

The Administration of Estates Act, 1833 (3 & 4 Wm. 4, c. 104), makes the freehold lands of a deceased person assets for payment of his simple contract debts. The Dower Act, 1833 (3 & 4 Wm. 4, c. 105), passed the same day, section 5, enacts that "all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts or engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower." The simple contract debts of the intestate take priority over the widow's right to dower, and should be paid first out of the proceeds of the sale of his real estate. There are two cases which are said to be against this contention, but the observations of the Judges in those cases were only dicta and not necessary to the decision: *Spyer v. Hyatt* (1), before Sir John Romilly, and *Jones v. Jones* (2), before Wood, V.-C. The former was a case of a copyhold estate and of the widow's right to freebench. Not much weight is to be attached to it, as the Dower Act did not apply to copyholds: *Powdrell v. Jones* (3); *Smith v. Adams* (4). The latter case was one of a mortgage, which was held to have priority over the widow's dower. There is no reported case since on the point. The editor of the last edition of Williams on Real Property, 20th ed. (1906), p. 318, note (n), questions the opinions expressed in these two cases, and submits that 3 & 4 Wm. 4, c. 104, makes a man's lands "subject or liable" to his debts, though his creditors have no charge thereon. [He also referred to Williams on Settle-

(1) 20 Beav. 621.

(2) 4 K. & J. 361.

(3) 2 Sm. & G. 407.

(4) 5 D. M. & G. 712.

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ment of Real Estate, p. 94, and Lush on Husband and Wife, 2nd ed. (1896), p. 98, note (m).]

M^cGusty, for Joseph Abbott:—

The construction placed on these statutes in *Spyer v. Hyatt* (1) and *Jones v. Jones* (2) has been adopted for a very long time, and ought not now to be departed from. All the text-books, until the late editions of Williams on Real Property, adopt the view taken by Sir John Romilly and Wood, V.-C. See Tudor's Real Property Cases, 3rd ed. (1879); Lewis Bowles's Case, p. 79; Sugden on Vendors and Purchasers, 14th ed. (1862), p. 458; 2 Seton on Decrees, 5th ed. (1883), p. 808; Davidson on Conveyancing, vol. 3, part 2, 3rd ed. (1873), p. 853; Shelford's Real Property Statutes, 9th ed. (1893), p. 346: it is only in the 10th edition of that work (1902) that the editor refers to the note in Williams' R. P., 19th ed., p. 318. The observations of Wood, V.-C., in *Jones v. Jones* (2) were not mere dicta; he made them a ground of his decision. *Spyer v. Hyatt* (1) must have been acted on by the Court of Chancery in numerous administration suits. "Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them": *Ex parte Willey*; *Re Wright* (3), per Jessel, M.R., at p. 127. So, in *Cohen v. Bayley-Worthington* (4), the House of Lords declined to depart from the decision in *Bell v. Holtby* (5), it having been followed for so many years.

[THE MASTER OF THE ROLLS referred to *M^cNaul's Estate* (6), where the Court of Appeal over-ruled *Billing v. Welch* (7).]

But these dicta, if they are only dicta, are right. The argument for the plaintiffs is based on the joint operation of the two statutes, but the words of each statute must be considered separately. There is nothing in 3 & 4 Wm. 4, c. 104, affecting dower itself. It was neither the scope nor the intention of that Act to interfere with

(1) 20 Beav. 621.

(2) 4 K. & J. 361.

(3) 23 Ch. D. 118.

(4) [1908] A. C. 97.

(5) 15 Eq. 178.

(6) [1902] 1 I. R. 114.

(7) 1. R. 6 C. L. 88.

the right of dower, nor to affect the power of a person to charge part of his debts on his lands : see *British Mutual Investment Company v. Smart* (1). The Dower Act did not really alter the original nature of dower, which was indefeasible before that Act, but defeasible after it. As to section 5, the estate of an owner of land is not subject to debts contracted by him, until the creditor has got a judgment registered against the land ; therefore the husband's land is not "subject" to any debts whatever. Any alienation must be by the husband himself. *Jones v. Jones* (2) contains a very clear pronouncement on this section, that not mere debts, but debts to which the husband's lands were liable, are valid as against his wife's right to dower.

Statutes are not in doubtful matters to be construed to alter the common law : *Arthur v. Bokenham* (3), per Trevor, C.J. ; and words are not to be construed so as to take away rights which existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature : *In re Cuno* (*Mansfield v. Mansfield*) (4), per Bowen, L.J., at p. 17. An agreement not to bar dower is enforceable against a husband, section 11, and, therefore, against his creditors.

M'Cann, for the defendant, Anne M'Mackin, supported the argument for the plaintiffs.

THE MASTER OF THE ROLLS :—

I think it would be a very unfortunate thing for a Judge of first instance to dissent from the views expressed by the Master of the Rolls in *Spyer v. Hyatt* (5), and by Wood, V.-C., in *Jones v. Jones* (2), adopted and acted upon as they have been (so far as I know) until a recent period, when a doubt occurred to the respective editors of Lush on Husband and Wife, and Williams on Real Property. Mr. Moore says that the first book which cast any doubt on these decisions was Lush on Husband and Wife (2nd ed., 1896, p. 98). The way in which the editors of that work deal with the question is as follows :—" In spite of the wide wording of this section

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(1) L. R. 10 Ch. 567.

(2) 4 K. & J. 361.

(3) 11 Mod. 150.

(4) 43 Ch. D. 12.

(5) 20 Beav. 621.

M. R. (section 5), and although freeholds and copyholds of a deceased
 1908. person are assets for the payment of his debts, it has been held
 NORTHERN BANK that the widow's right to dower or freebench has priority over the
v. simple contract creditors of the deceased, the ground of the judg-
 M'MACKIN. ment being that, since the husband died seised of the lands
 subject to dower, he cannot be said to die seised of the dowable
 portion of them : *Spyer v. Hyatt* (1). It is difficult to see the cor-
 rectness of this decision, considering the explicit wording of the
 section upon which the case was decided." I certainly agree with
 Mr. Moore, that the observations of Sir John Romilly with reference
 to the Dower Act were, strictly speaking, unnecessary for the deci-
 sion in the particular case ; but the reasons given by the Master of
 the Rolls at p. 623 of the report, are as follow :—" If the argument
 on behalf of the plaintiff was to prevail, it would follow that where
 a person, seised of lands out of which his wife is entitled to dower,
 died intestate, the creditors could take the whole of the land, and
 altogether defeat the widow's dower, but they cannot do so. In
 truth, what is claimed by or comes to the widow was no part of
 what the intestate was seised of at his death. He died seised of
 lands subject to the widow's right of dower, and it is only that
 which became subject to payment of his debts." Similar obser-
 vations may be made as regards the judgment of Wood, V.-C.,
 in *Jones v. Jones* (2). The remarks were, perhaps, unnecessary
 for the decision ; but that after the lapse of fifty years I, as
 a Judge of first instance, should, on the strength of doubts
 developed by text-writers very recently, disregard the opinions
 of Sir John Romilly, M.R., and Vice-Chancellor Page-Wood,
 seems to me to be a startling proposition, notwithstanding what
 happened in *M'Naul's Estate* (3), to which I referred during
 the argument. Wood, V.-C., says, in *Jones v. Jones* (2), at
 p. 365 :—" The Act was intended, from the beginning to the
 end, for the benefit of the husband, by giving him powers of
 alienating his lands without the consent of his wife, which
 powers, until the Act came into operation, he did not possess.
 Considerable benefits are given also to the wife, who is to be
 entitled to dower out of equitable estates, to which she had no

(1) 20 Beav. 621. (2) 4 K. & J. 361. (3) [1902] 1 I. R. 110.

claim independently of the Act; but the main scope and object of the Act are the rights which it gives to the husband. These rights are conferred by the 4th and 5th sections. By the 4th section he is to have an absolute, by the 5th section a partial, power of alienation or disposition over his lands, and, in either case, such alienation or disposition by him, whether absolute or partial, is to be valid and effectual as against his widow." Mr. M'Gusty's main argument was based on this judgment. These two sections, 4 and 5, deal with alienation or disposition, whether absolute or partial, by the husband in his lifetime, by which he can wholly or partially defeat his widow's right to dower. I must say that the Vice-Chancellor must have thought that an involuntary disposition of his assets was never meant to come within these sections. But the Vice-Chancellor goes on: ". . . All partial estates and interests, just as much as absolute estates and interests, are to be valid and effectual against the widow—not, indeed, mere debts, but debts to which her husband's lands are subject or liable. Such debts are in effect partial interests in those lands, and this lady might as well seek to oust a life estate created by her husband, and to obtain against the heir indemnity in respect of a partial interest of that description, as to sustain the equity for which she now contends. . . . As regards *Spyer v. Hyatt* (1), which was cited in argument, with the decision and the first part of the observations of the Master of the Rolls in that case I quite concur. Mere debts, to which the lands of a deceased husband are not subject or liable, are not within the 5th section of the Act, and are not by that section made valid or effectual as against his widow's right to dower." Fifty years ago that eminent Judge construed that section of the Act in the way in which Mr. M'Gusty says it should now be construed. The words "subject or liable" are dealt with. There was no ambiguity in the construction placed by him on the Act. There was no overlooking of anything; it was a reasoned opinion, though in the particular case it was not necessary to express it. These two cases have apparently been regarded as law in the text-books. In the 4th edition of

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M. R. Tudor's Real Property Cases (1898), *Spyer v. Hyatt* (1) is referred
 1908. to without comment. Lord St. Leonards, in Sugden on Vendors
 NORTHERN and Purchasers (14th ed.), p. 458, cites both without question: so,
 BANK Davidson, vol. 3, part 2 (3rd ed.), p. 853; and the learned editors
 v. of Shelford's Real Property Statutes (1903 ed.), p. 346, cite *Spyer v.*
 M·MACKIN. *Hyatt* (1) in the note to the 5th section of the Dower Act in sup-
 port of the following statement:—"Notwithstanding the statute
 3 & 4 Wm. 4, c. 104, and the 5th section of this Act, the widow's
 right to dower or freebench has still priority over mere creditors
 of a deceased husband"; and in the note to 3 & 4 Wm. 4, c. 104,
 p. 477, they add:—"This Act has not affected a widow's right to
 dower or freebench, which still has priority over mere creditors
 of the deceased," citing *Spyer v. Hyatt* (1). In the 10th edition
 the editors say (p. 369):—"But see Williams' Real Property
 (19th ed.), p. 318, note." Seton on Decrees, vol. 2, p. 808,
 accepts *Spyer v. Hyatt* (1) as law, and I have no doubt in my
 mind that a number of cases have been decided in accordance
 with it. This is the first case in which it has been challenged,
 on the strength of a note which appeared in the 19th edition
 of Williams' Real Property, p. 318. I have no recollection
 of it in the earlier editions; but in any case, it strikes me
 that, having regard to the eminence of the Judges who decided
Spyer v. Hyatt (1) and *Jones v. Jones* (2), the editor of the
 19th edition of Williams might have been a little less uncom-
 plimentary in his note. [THE MASTER OF THE ROLLS here read
 the note to the word "gratuitous."] Lord Romilly's dictum
 was certainly not gratuitous. The editor's reference to the
 Land Transfer Act, 1897, caused me to refer to a text-book
 which has not been mentioned by counsel, viz., The Land
 Transfer Acts, 1875 and 1897, by Brickdale and Sheldon, 2nd
 edition (1905), in which I found a note to section 2, sub-section 8,
 of the Act of 1897. I need not read the sub-section. At p. 277
 I read:—"The case of a man dying intestate, and leaving
 a widow entitled to dower, should perhaps be excepted from
 the above general statement as to the effect of the sub-section.
 It was held in *Spyer v. Hyatt* (1) that, notwithstanding the

(1) 20 Beav. 621.

(2) 4 K. & J. 361.

5th section of the Dower Act (3 & 4 Wm. 4, c. 105), the widow's dower had priority to the claims of all creditors who were not entitled to an actual charge on the land by virtue of some disposition made by the intestate (see *Jones v. Jones* (1)). The principle of these cases seems to be that, if the intestate has made no total or partial disposition of his real estate, what the widow claims in right of her dower is no part of what belonged to the intestate at his death, and that the only part of his estate which is subject to debts is his estate less his widow's right of dower. There would appear to be nothing in this Act to displace this reasoning, or to render the widow's concurrence unnecessary in a sale by the personal representatives, where she is dowable." In my judgment, that is an admirable commentary on the cases, and I see no reason for altering or departing from the construction placed upon the statute so many years ago. Even if I thought that the authorities I have referred to were wrong, which I do not, I would follow them, and leave it to the Court of Appeal to alter the law.

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Solicitor for the plaintiffs: *W. Lynch.*

Solicitors for Joseph Abbott: *Fred Sutton & Son.*

Solicitor for the defendant Robert M'Mackin: *H. Murphy.*

W. L.

(1) 4 K. & J. 361.

Wylie, J. IN THE MATTER OF THE ESTATE OF ROBERT WILLIAM
1909. BLACKWOOD AND OTHERS.

Mar. 15, 16,
18.

Purchase agreement—Bonus—Irish Land Act, 1903, section 48.

Appeal.
April 29.

By an agreement of the 1st January, 1905, H., an occupying tenant, agreed with his landlord for the purchase of his holding under the provisions of the Irish Land Act, 1903, for £5010, and he applied to the Land Commission for an advance of that sum. This agreement was lodged by the vendor on the 1st March, 1905. On the 1st June, 1908, the Estates Commissioners declared the lands comprised in the vendor's originating application an estate, excluding, however, H.'s holding, and the purchase-money of that estate was duly allocated, with a 12 per cent. bonus, on the 26th June, 1907. On the 24th November, 1908, the Estates Commissioners made an order, refusing to sanction the advance of £5010 applied for by H. In December, 1908, H.'s landlord agreed to accept £4500 for the holding, of which H. agreed to pay £1500 in cash, and to apply for an advance of £3000 to the Land Commission. This agreement was reduced to writing and forwarded to the Estates Commissioners, who, by order of the 22nd December, 1908, purported to rescind their former order, and made an advance of £3000. On the 18th February, 1909, the Estates Commissioners purported to fiat the former agreement lodged by the vendor on the 1st March, 1905, subject to the modification that £3000 was advanced in lieu of £5010 therein applied for:—

Held, by the Court of Appeal, affirming Wylie, J., that the agreement of December, 1908, was a new agreement; and that, as it was entered into after the 24th November, 1908, the vendor was only entitled to a bonus at the rate of 3 per cent. on the advance of £3000.

QUESTION arising on allocation as to whether the percentage under section 48 of the Irish Land Act, 1903, was payable at the rate of 12 per cent. or 3 per cent. in respect of portion of the lands comprised in the originating application.

The circumstances under which the question arose were as follows:—On the 4th January, 1905, the vendors lodged an originating application for the sale of certain lands set out in Part 1 of the first schedule thereto, including a holding in the occupation of a tenant named Hanbury. By an agreement dated the 1st January, 1905, Hanbury agreed to purchase this holding for a sum of £5010, and thereby applied to the Land Commission

for an advance of the entire sum—the printed portion of clause 3 of the agreement, applicable to a case in which the tenant is to provide part of the purchase-money being struck out. This agreement was lodged by the vendors on the 1st March, 1905. On the 1st June, 1908, the Estates Commissioners declared the lands comprised in the originating application a “separate estate,” excluding therefrom the holdings of Hanbury and two other tenants, and the purchase-money of that estate, with a 12 per cent. bonus, was allocated on the 26th June, 1908. On the 1st December, 1908, the Estates Commissioners declared the holdings of the two other tenants above referred to a “separate estate,” and the purchase-money of that estate was allocated on the 7th December, 1908, and a 12 per cent. bonus given on the ground that the parties had come to a final agreement prior to the 24th November, 1908. On the 24th November, 1908, the Estates Commissioners made an order refusing to sanction the advance applied for in Hanbury’s case. In December, 1908, Hanbury agreed to lodge £1500 in cash, if the vendors would sell for £4500 instead of £5010, and apply for an advance of £3000, and this the vendors agreed to. This agreement was put in writing, and sent to the Estates Commissioners, who thereupon by order dated the 22nd December, 1908, purported to rescind their former order, and to make an advance of £3000 in lieu of the sum of £5010 in the former agreement, the sum of £1500 to be paid in cash by the tenant. On the 18th February, 1909, the Estates Commissioners purported to fiat the former agreement, subject only to the modification that £3000 was advanced in lieu of the sum of £5010 therein applied for. The question now arose as to whether the bonus was payable at the rate of 12 per cent. or 3 per cent. in respect of the advance of £3000?

Wylie, J.
1909.

In re
BLACKWOOD’S
ESTATE.

Matheson, K.C., for the vendor.

Serjeant O'Connor, K.C., for the Treasury.

The arguments were the same as in the Court of Appeal, reported *post*, pp. 387, 388.

Wylie, J.
1909.

WYLIE, J. :—

In re
BLACKWOOD'S
ESTATE.

March 18.

In this case the question as to whether the bonus is payable at 12 per cent. or 3 per cent. has again been raised. The same question had been decided by me in a number of cases prior to this one, and I am glad to say that in all of them I was able, in accordance with what I believed to be the equity of the case, to decide in favour of a 12 per cent. bonus. Each of those cases differed considerably from the others in its special facts, but I was able to deal with them upon one clear principle common to all, viz., that the original agreement for purchase which was entered into prior to the 24th November, 1908, was in substance and in fact carried out. But, my decisions in some of those cases have evidently been misunderstood. In some of them there was a mere reduction of purchase-money. For example, the tenant agreed to buy at £500, and to apply for an advance of the entire sum. The Estates Commissioners refused to advance more than £450, and the vendor being informed of this, agreed to accept the smaller sum, and the sale was carried out on that basis, no new agreement being required, because the old agreement in effect meant that the tenant agreed to purchase at £500, or such smaller sum as the Estates Commissioners would advance and the vendor would accept. In such a case I think it is clear that the old agreement is in substance carried out, and though the acceptance of the reduced price or waiver of the difference was subsequent to the 24th of November, the old agreement being prior in date carried a 12 per cent. bonus. In another case a tenant agreed to buy for a specified sum, and to apply for an advance of the full amount, and after the originating application and agreement were lodged the tenant-purchaser assigned his interest in part of the holding, and another part of the holding not assigned was sublet; and when the Estates Commissioners came to deal with the case, they found three people in occupation of different parts of the holding—the assignee in one part, the representative of the original tenant-purchaser in another part, and a sub-tenant in a third part; and they accordingly proceeded to carry out the original agreement by the application of the 15th section of the Act of 1903, sub-sections 1, 2, 4. They divided the purchase-money named in the original agreement into three parts, according to values

of the three portions separately occupied, adding a sum to the sub-tenant's portion of the purchase-money to provide for the payment of the intervening interest, and advancing to the three occupiers the three sums which made up the original purchase-money. This sum the vendor got pursuant to his agreement for sale, and it is immaterial to him how the holding was divided up, or whether the Estates Commissioners required the three occupiers to sign new agreements. Here, again, I held that all this was merely machinery for carrying out in a particular way the old agreement for sale, and that that agreement being dated prior to the 24th November carried a 12 per cent. bonus.

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1909.
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The above reference will, I think, sufficiently illustrate the principle on which all the former cases have been decided.

Let us now examine the facts in the present case, and see whether and how far the same principle applies to it. The facts, as far as I can gather them from Mr. Wilson's affidavit and the other documents in the case, are these:—The vendors on the 4th January, 1905, lodged an originating application for the sale of certain lands set out in Part 1 of the first Schedule thereto, including a holding in the occupation of a tenant named Hanbury. By an agreement, dated the 1st January, 1905, Hanbury agreed to purchase this holding for a sum of £5010, and thereby applied to the Land Commission for an advance of the entire sum.—the printed portion of Clause 3 of the agreement, applicable to a case in which the tenant is to provide part of the purchase-money, being struck out. This agreement was lodged by the vendors on the 1st March, 1905, and the agreements of the other tenants were doubtless lodged about the same time. On the 1st June, 1908, the Estates Commissioners declared the lands comprised in the originating application a "separate estate," excluding therefrom the holdings of Hanbury and two other tenants, and the purchase-money of that estate, with 12 per cent. bonus, was allocated on the 26th June, 1908. On the 1st December, 1908, the Estates Commissioners declared the holdings of the two other tenants above referred to a "separate estate," and the purchase-money of that estate was allocated on the 7th December, 1908, and a 12 per cent bonus given on the ground that the parties had come to a final agreement prior to the 24th November, 1908.

Wylie, J. Now, why was Hanbury's holding excluded both from the estate
1909. declared on the 1st June and that declared on the 1st December,
1908? I have not seen the file of documents in this case, but I
In re can have no doubt whatever it was because the vendors were
BLACKWOOD'S informed prior to June, 1908, that the Estates Commissioners
ESTATE. would not advance more than £3000 in Hanbury's case, and,
therefore, the agreement in his case could not be carried out. It
is quite clear also that up to the 24th November, 1908, no new
agreement had been arrived at between the vendors and Hanbury,
because on that date the Estates Commissioners made an order
refusing to sanction the advance applied for. Now, what was the
effect of that order upon the position of the parties. Section 35
of the Act of 1896 provides that if the advance is refused the
agreement shall be void, and the tenant shall be liable to pay
rent and arrears as if the agreement had not been made. What
occurred after this is clearly shown by the affidavit of Mr. Wilson
and the letters therein referred to. In December, 1908, Hanbury
agreed to lodge £1500 in cash, if the vendors would sell for £4500
instead of £5010 and apply for an advance of £3000, and this
the vendors agreed to. This agreement it seems to me was beyond
all doubt an entirely new agreement, and absolutely different in
substance from the former agreement. The tenant, instead of
lodging nothing, is to lodge £1500; the vendors take £510 less
and lose the bonus on £2010. Now, what was done pursuant to
this agreement? It is put into writing and sent to the Estates
Commissioners, who thereupon took what seems to me an extra-
ordinary course. Having already, by their order of the 24th
November refusing the advance, made the former agreement void
and restored the relationship of landlord and tenant with all its
rights and liabilities, they purport by an order of the 22nd Decem-
ber, 1908, to rescind their former order, and to make an advance
of £3000 in lieu of the sum of £5010 in the former agreement,
the sum of £1500 to be paid in cash by the tenant. Then on the
18th February, 1909, they purport to fiat the former agreement,
subject only to the modification that £3000 was advanced in lieu
of the sum of £5010 therein applied for. That is, having
sanctioned an advance of £3000 on the terms of the tenant lodg-
ing £1500 in cash, which two sums make together only £4500,

they fiat an agreement for purchase at £5010, by which an advance of the whole sum is applied for, and the tenant is to lodge nothing, subject to the advance of £3000 only, leaving the balance of £2010 entirely unaccounted for. It seems to me that the order of the 22nd December, 1908, and the fiat of the 18th February, 1909, were wholly irregular as well as inconsistent, and can only be accounted for as an effort to restore the old agreement, while carrying out the new one, with a view of making a case for a 12 per cent. bonus. In my opinion even the Estates Commissioners cannot by any form of order or fiat push back the date on which an agreement is entered into so as to qualify for a bonus contrary to the provisions of the Act. I hold that the agreement for purchase which has been carried out in this case was entered into after the 24th November, and therefore the bonus is payable at 3 per cent only.

Wylie, J.
1909.
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BLACKWOOD'S
ESTATE.

J. E. W.

The vendor appealed (1).

Appeal.
April 29.

Matheson, K.C., and *A. V. Matheson*, for the appellant:—

We contend that the original purchase agreement, which was admittedly entered into prior to the 24th November, 1908, was in effect carried out, and that the change of terms subsequently introduced did not convert it into a new agreement, so as to disentitle the vendor to payment of the bonus at the higher rate. There is an important distinction between the form of this agreement for the sale of the holding [Form F, Rules of 23rd October, 1903], and that of agreements for sale between vendor and tenant under the Rules of March, 1897. The latter were made expressly conditional on the Irish Land Commission sanctioning the advance named, whereas agreements in Form F are conditional on the estate of which the holding, the subject-matter of the agreement, forms a part, being sold under the provisions of the Irish Land

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES FITZGIBBON and HOLMES.

Appeal. Act, 1903. No doubt, under the provisions of section 35 of the
 1909. Land Law (Ireland) Act, 1896, agreements in the old form became

In re void in case the advance was refused, and the tenant thereupon
 BLACKWOOD'S ESTATE. became liable to pay rent and arrears as if the agreement had not
 been made, but that was found objectionable in practice, and
 accordingly the form of agreement was deliberately altered; and
 these purchase agreements now contain two distinct things—an
 agreement for the sale of the holding as part of a larger estate in
 case that estate is sold under the provisions of the Act, and an
 application by the tenant to the Land Commission for an advance,
 which advance may or may not be granted, but the non-granting
 of which does not under section 35 of the Act of 1896 invalidate
 the existing agreement between the vendor and tenant. The
 cases mentioned by Wylie, J., in his judgment show that a
 landlord may waive some of the terms of the original agreement
 without a fresh agreement being constituted, and nothing more
 occurred here.

Serjeant O'Connor, K.C., and Dudley White, for the
 respondents:—

This case is distinct from those mentioned by Wylie, J., where there was a waiver by the landlord alone, and not a mutual waiver by both landlord and tenant. A landlord could waive portion of his right, and enforce specific performance of the contract with that variation. Here, however, an entirely new contract was entered into; the landlord agreed to accept £4500 instead of £5010, the tenant was to apply for an advance of £3000 instead of £5010, and to pay the balance in cash, and this new agreement having been entered into after the 24th November, 1908, the bonus is payable at the lower rate. Apart altogether from section 35 of the Act of 1896, once the Land Commission refused on the 24th November, 1908, to sanction the advance of £5010, the agreement subsisting up to that date between the landlord and tenant, which was one conditional on the advance being made, came to an end, and was incapable of being specifically enforced; but section 35 of the Act of 1896 concludes the case.

THE LORD CHANCELLOR :—

We are all of opinion that the decision of Wylie, J., is right, and must be affirmed.

Appeal.

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ESTATE.

I approach the consideration of this case as if the agreement for sale had been one between a landlord and tenant apart from the intervention of the Land Commission altogether. If a landlord agreed to sell a holding to a tenant for £5010, which sum the tenant was to procure from a money-lender, and, on the money-lender refusing to advance more than £3000 the parties agreed upon fresh terms, the entire purchase price being reduced to £4500, and the tenant undertaking to pay £1500 in cash, could it be suggested that, according to the ordinary law of contract, a new agreement had not been entered into? How does the intervention by the Land Commission make any difference? There are substantial distinctions between the old and the new agreements. The entire purchase-money is reduced; the advance which is to be applied for by the tenant is reduced; an entirely new term, namely, the payment of £1500 in cash by the tenant, is introduced; and the tenant is to pay interest in lieu of rent on £4500 instead of on £5010. These are substantial variations; applying the ordinary law of contract, we must hold that a new agreement was entered into, and as it was entered into after the 24th November, 1908, the vendor's right to the 12 per cent. bonus is at an end. I express no opinion on the two cases referred to by Wylie, J., which are not before us. The decision appealed against is perfectly right, and the appeal must be dismissed with costs.

FITZ GIBBON, L.J. :—

I agree.

HOLMES, L.J. :—

This is a clear case. The original agreement between the parties was put an end to in one of two ways—(1) by the order of the Land Commission refusing the advance of £5010, taken in connexion with section 35 of the Act of 1896; or (2) by the action of the parties themselves in substituting an entirely new agree-

Appeal. ment, involving different rights and liabilities, for that which they
 1909. had originally entered into. That substituted agreement has
In re now been carried out; and as it was entered into after the 21st
 BLACKWOOD'S ESTATE. November, 1908, the vendor is not entitled to the bonus at the
 Holmes, L.J. higher rate.

Solicitor for the Treasury: *W. G. Towers.*

Solicitors for the vendor: *Stephen Gordon & Son.*

R. ST. J. C.

Wylie, J.
 1909.

IN THE MATTER OF THE ESTATE OF THE EARL
 DE MONTALT.

June 15, 19.

*Statutes of Limitations (3 & 4 Wm. 4, c. 27, ss. 2, 25; 37 & 38 Vict. c. 57,
 ss. 1, 10)—Rent—Charity—Express trust.*

A testator devised all his real estate to two trustees and their heirs, to the use of the trustees for a term of years, and, subject thereto, upon trust, after testator's death, to convey said real estate to the use of his brother for life, with remainders over, and directed his trustees, previously to or by the settlement in his will directed, to charge a competent part of his said estate, called the D. estate, with the perpetual payment to the poor of five specified parishes of a clear annual sum of an amount to be ascertained as in his will directed, but not less than £22, *such annual sum to be annually distributed by the possessor of the D. estate for the time being for the benefit of the poor of the said parishes in such manner as such possessor should think fit.*

The trustees, in pursuance and performance of the trust reposed in them, by a settlement, duly conveyed the lands to the uses directed by the will, subject, as to the mansion-house of D. and the park and demesne lands, to the perpetual payment of the said annuity, as by the will directed. No payment had been made in respect of this annuity for over forty years, and there was no evidence that any payment had ever been made in respect of it:—

Held, that the annuity was secured by an express trust, within the meaning of section 25 of 3 & 4 Wm. 4, c. 27, and was not barred; but that all past gales of the annuity were barred by section 10 of 37 & 38 Viet. c. 57.

In re Drake's Estate (ante, p. 136) distinguished. *Hughes v. Coles* (27 Ch. D. 231) followed.

HEARING OF OBJECTION by the vendor to the final schedule.

The facts as appearing in the judgment of Wylie, J., were as follows:—

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By his will, dated 28th March, 1804, Viscount Hawarden devised all his real estate to two trustees and their heirs, to the use of the trustees for a term of 1000 years, and subject thereto upon trust, after testator's death, to convey said real estate to the use of his brother, the Hon. Cornwallis Maude, for his life, with remainders over, in strict settlement. And the testator, by his said will, directed his trustees, previously to, or by the settlement thereby directed, to charge a competent part of his said estate called "the Dundrum estate" with the perpetual payment to the poor of five specified united parishes in the county of Tipperary, of a clear annual sum of an amount to be ascertained as in the will directed, but not less than £22, such annual sum to be annually distributed by the possessor of the Dundrum estate for the time being for the benefit of the poor of the said parishes in such manner as such possessor should think fit.

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By a settlement dated the 29th May, 1813, the said trustees, in pursuance and performance of the trust reposed in them by said will, conveyed the lands to the uses directed by the will, subject, as to the mansion house of Dundrum and the park and demesne land, to the perpetual payment of the said annuity as by the will directed.

A claim on foot of this annuity had been placed on the final schedule at No. 9 in favour of the Commissioners of Charitable Donations and Bequests, and the vendor had filed an objection thereto on the ground that the claim was barred. No payment had been made in respect of the annuity for over forty years, and there was no evidence that any payment had ever been made in respect of it.

Gerald FitzGibbon, K.C. (with him *R. H. Macrory*), for the vendor:—

The question is, whether the words create an express trust? The only words that distinguish the case from *In re Drake's Estate* (1) are the words "to be annually distributed by the

(1) *Ante*, p. 136.

Wylie, J.
1909.

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possessor . . . as such possessor should think fit." These words do not constitute this "the case of a devise to poor persons to be selected by the devisee, or where the devise casts upon the devisee the duty of seeing to the application of the annuities to the specified charitable purposes," within the words of Palles, C.B., in *In re Drake's Estate* (1). The case does not come within section 25 of 3 & 4 Wm. 4, c. 27.

J. H. Pigot, for the Commissioners of Charitable Donations and Bequests:—

This annuity is secured by an express trust apart from the fact that it is a charitable annuity. *In re Drake's Estate* (2) decided that a mere direction to pay does not create an express trust. Here a duty is imposed on the trustees to create a charge, and on the owner of the estate to ascertain who are the persons to benefit. The owner, by taking the estate, becomes a trustee against his will, to the extent of £22 per annum, and is bound to select the objects of the testator's bounty. The selection, coupled with the discretion, creates an express trust within the meaning of sect. 25. The words of this will bring the case within the distinction referred to by Palles, C.B., in his judgment in *In re Drake's Estate* (2).

R. H. Macrory, in reply:—

The words used by the testator here, at most, create a power. The words "to distribute among the younger children of A B," would clearly create only a power, and it is admitted that the fact that the object of the bounty is the poor, does not make any difference. In order to come within section 25, you must make the first taker of the lands an express trustee *qua* £22. On his death, the duty of paying the annuity would devolve on his personal representatives. This demonstrates the fallacy of the suggestion that each successive owner of the lands is an express trustee.

(1) *Ante*, p. 148.

(2) *Ante*, p. 136.

WYLIE, J.:—

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[After stating the facts as above set out, his Lordship continued—]

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The claim in respect of this annuity is barred, unless it is secured by an express trust within the meaning of section 25 of the 3 & 4 Wm. 4, c. 27. Having regard to the recent decision of the Court of Appeal in *Drake's Estate* (1), that section must be taken to apply to a charitable annuity in the same manner as to any other annuity charged on land. Is, then, this annuity secured by an express trust within section 25? What is required to bring a case within that section is thus stated by Lord Cairns in *Cunningham v. Foot* (2). "There must," he says, "be a trustee in whom the land is vested; there must be an 'express trust,' by which I understand the Legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience—a trust arising upon the words of the instrument itself." And further on in his judgment, discussing the difference between a trust and a charge, Lord Cairns says: "It was decided—and the decision has always been followed and never questioned since—in *Hodge v. Churchward* (3) that a devise of land to pay a sum of money to A B was a charge, and was not a trust for A B . . . And, therefore, it being established law that a devise to A 'paying' a sum of money to B is not a trust, but is a charge, it must also be the law that a devise to A 'to well and truly pay' to B, is not a trust, but is a charge, and a devise to A 'on condition of well and truly paying' must be a charge and not a trust."

So, in *Francis v. Grover* (4), Vice-Chancellor Wigram says:—"Where an annuity is given by will, and the real estate of the testator is charged with payment of it, and then the estate is simply devised, charged with the payment of the annuity, my opinion is that this is not a case of an express trust within the 25th section of the statute. It is a bequest or devise which creates a liability in favour of the annuitant, but it does not impose any fiduciary character on the devisee."

(1) *Ante*, p. 140.

(3) 16 Sim. 7.

(2) 3 App. Cas. at p. 984.

(4) 5 Hare, 39.

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Lord Blackburn, in giving judgment in *Cunningham v. Foot* (1), also says:—"No technical words or terms of art are required to create an express trust; but it is, I think, necessary that there should be an expressed intention to rely on and place confidence in the persons to whom the property is given, that they will as trustees apply it to fulfil the intentions of the testator."

Now if we apply the principles of law thus laid down to the present case, how does it stand? Viscount Hawarden by his will devised the Dundrum estate to two trustees upon trust, subject to a certain term, and to certain charges, to convey the lands to certain persons in the manner in said will specified; and he thereby directed the trustees to charge a competent part of the lands with the perpetual payment of an annuity to the poor of certain parishes, such annuity to be annually distributed by the possessor of the Dundrum estate for the time being for the benefit of the poor of said parishes, in such manner as such possessor shall think fit. You have therefore the lands vested in trustees upon trust to charge an annuity for certain persons. The charging of the annuity therefore is secured by an express trust, but it seems to me—and I think counsel for the claimants during the argument so admitted—that the moment the trustees by the settlement of 1813 conveyed the lands and charged them with the annuity as directed by the will, the express trust imposed upon the trustees with reference to the annuity was discharged and at an end. No trust or duty in respect of the payment or distribution of the annuity is imposed upon the trustees. If therefore the annuity is secured by an express trust since the execution of the settlement of 1813, the lands must have become vested in the persons to whom they were conveyed by that settlement upon an express trust for the payment of the annuity.

Now, whether this is so, must, I think, be ascertained by construing the will and settlement together. The effect, it seems to me, will be, so far as material for the present purpose, to make the persons to whose use the lands were conveyed by the settlement devisees of the lands charged with the annuity, such annuity to be annually distributed by such of the devisees

as would be for the time being in possession of the Dundrum estate for the benefit of the poor of said parishes in such manner as such devisee should think fit. Wylie, J.
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Now, does the will, when so read, create an express trust? It is clear, I think, from the authorities I have referred to, that if the words of the will had been "such annuity to be paid annually to some specified persons for the benefit of the poor," a trust would not be created. Would it make any difference if the words were "to be distributed annually amongst specified persons in specified shares for the benefit of the poor"? I think not. The use of the word "distribute" instead of "pay" would not appear to me to alter the character of the duty or obligation imposed on the person liable to pay. In re
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Do, then, the words used in this will make a difference? I think they do. They seem to me, in the words of Vice-Chancellor Wigram in *Francis v. Grover* (1), "to impose a fiduciary character on the devisee"; and I think there is in the will itself, in the words of Lord Blackburn in *Cunningham v. Foot* (2), "an expressed intention to rely on and place confidence in the persons to whom the property is given, that they will, as trustees, apply it to fulfil the intentions of the testator." The will seems to me to show a clear intention on the part of the testator, that an annual sum of not less than £22 should be charged upon the Dundrum estate, and distributed annually amongst the poor of certain parishes; the duty of charging he imposes as a trust on the trustees of his will, and the duty of distributing he imposes upon the devisee for the time being in possession, according to his discretion. That seems to me to be a duty of a fiduciary character, expressly imposed by the will on the devisees, and therefore an express trust within the meaning of the 25th section.

I think this decision is in accordance with the view of the Lord Chief Baron, as expressed in his judgment in *In re Drake's Estate* (3), where he says—"I can see that a distinction might exist in the case of a devise to poor persons to be selected by the devisee, or where the devise casts upon the devisee the duty of seeing to the application of the annuities to the specified charitable purposes."

(1) 5 Hare, 39.

(2) 3 App. Cas. 984.

(3) *Ante*, p. 148.

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Being of opinion, therefore, that this annuity is secured by an express trust, the only remaining question is, What is now recoverable?

This brings me again to the decision in *Hughes v. Coles* (1), in which, where an annuity charged on land was secured by an express trust, and no payment had been made for over twenty years, Kay, J., held, on the construction of the 10th section of the Limitation Act of 1874, that all future gales were recoverable, but that all past gales which became due prior to claim made were barred. That decision has been criticized in some cases; but it has not been overruled. I felt bound to follow it in *Boyce's Estate* (2), to which it applied. It is the decision of an eminent Judge on the exact point involved in this case; and though I would feel it my duty to follow it, even if I had some doubt as to its correctness, I must say that, having again looked carefully into the case and the section with which it deals, I do not myself see any ground for the doubts that have been expressed with reference to it.

The section in question contains two distinct enactments—(1) that no action shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, and secured by an express trust, or (2) to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged, or payable and so secured, except within the time within which the same would be recoverable if there were not any such trust. Now, an annuity charged on land is a “rent” within section 1 of the Act of 1874, and is not a “sum of money” charged on land, within section 8 of the Act, or within the first enactment in section 10, and is therefore not affected at all by section 10; whereas, past gales of an annuity so charged are clearly covered by the words “arrears of rent” in the second part of section 10, and are probably also within the first part of section 10, as “sums of money” so charged. Consequently, such past gales of annuity, “as arrears of rent” or “sums of money charged on land,” are, by section 10, taken out of the protection of section 25, and are barred; while the annuity itself, as regards future accruing gales,

(1) 27 Ch. D. 231.

(2) [1909] 1 I. R. at p. 138.

not being within section 10, is still protected by section 25. It seems to me, therefore, that *Hughes v. Coles* (1) was rightly decided, and I must overrule the objection as to future gales of the annuity.

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Solicitors for the vendor: *T. T. McCredy & Son.*

Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell, Weldon, & Co.*

J. E. W.

IN THE MATTER OF THE ESTATE OF THE EARL OF
DESART.

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Nov. 4, 17.

*Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 3, sub-s. 4—
Re-purchase of demesne by tenant for life—Graft.*

The tenant for life of an estate, under the terms of a will and a re-settlement, sold the agricultural portion of the estate to the tenants, under the Land Act, 1903. The Land Commission purchased the demesne for the purpose of re-sale to the vendor, who re-purchased the same for the sum of £20,200, representing the full value of the demesne, of which the sum of £16,200 was to be repaid by a purchase annuity, and the balance (£4000) was to be paid in cash by the vendor, in whom the demesne was, on the 24th June, 1909, vested in fee-simple.

The remaindermen having made application, under section 3, sub-section 4, of the Land Act, 1903 (2):—

Held, that they were entitled to an order, declaring that the land so re-sold should devolve in accordance with the terms of the settlement which, at the date of the sale to the Land Commission, affected it.

(1) 27 Ch. D. 231.

(2) Land Act, 1903, section 3 (1):—"Where the owner of an estate has entered into agreements, under the Land Purchase Acts, for the sale to persons other than the Land Commission of the estate, the Land Commission may purchase from him any demesne or other land in his occupation, and adjacent to, or in the neighbourhood of, the estate, at a price which, in their opinion, represents the selling value of that land, and in such case may re-sell the whole or any portion of that land to him. . ."

Section 3 (4):—"Where any land is re-sold in pursuance of this section, a Judicial Commissioner may, if he thinks it equitable, on the application within

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APPLICATION, on behalf of the Honourable Otway Frederick Seymour Cuffe, for an order that the lands mentioned in the schedule to a notice of the Estates Commissioners dated 2nd March, 1909, should, when resold to the vendor, devolve in accordance with the terms of the settlement dated 5th December, 1867, and the will of Otway O'Connor, Earl of Desart, dated 2nd April, 1861, under which the said lands were at the date of sale held by the vendor as tenant for life thereof.

There was a similar application on behalf of Lady Kathleen Pilkington.

The notice of 2nd March, 1909, was as follows :—

IRISH LAND COMMISSION.—ESTATES COMMISSIONERS.

Record No. E. C. 2232.

ESTATE OF THE RIGHT HONOURABLE HAMILTON JOHN AGHMONDESHAM CUFFE,
EARL OF DESART.

County Kilkenny.

WHEREAS the Land Commission, on the sale of an estate by the said Right Honourable H. J. A. Cuffe, Earl of Desart, have agreed to purchase the demesne referred to in the schedule hereto annexed, for the purpose of re-sale to the said Right Honourable H. J. A. Cuffe, Earl of Desart, who has agreed to re-purchase the same.

Take Notice, that unless cause is shown to the contrary within two months from this date, the Land Commission intend, for the purpose aforesaid, to make an order vesting the said demesne in the Land Commission. The said order will have the effect of vesting the said demesne in the Land Commission in fee-simple, subject as follows :—

- (a) To any public right affecting the lands ;
- (b) To the sporting rights reserved by the vendor ;
- (c) To any maintenance charge under the Public Works Acts ;
- (d) To any interests of the tenants on the lands, or of persons having claims upon those interests, and to any easements, rights, and appurtenances mentioned in section 34 of the Land Law (Ireland) Act, 1896 ; but, save as aforesaid, discharged from the claims of all persons interested in the lands, which

the prescribed time of any person who, at the date of the sale of the land to the Land Commission, was entitled to any estate in remainder or reversion in that land, order, upon such terms and conditions as he may think reasonable, that the land so re-sold shall devolve in accordance with the terms of the settlement which, at the date of the sale to the Land Commission, affected it."

claims shall, from the date of such vesting order, cease as against the lands, and attach to the purchase-money thereof, in like manner as immediately before the date of the order they attached to the lands.

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SCHEDULE.

The demesne purchased by the Land Commission and offered to the vendor.

[*Acreage and particulars of the Desart demesne.*]

Pursuant to the above notice, the Desart demesne was vested in the Earl of Desart, on 24th June, 1909, in fee-simple.

The will and settlements under which the Desart estate was held, and the facts material to the present report, sufficiently appear in the judgment of Ross, J.

Serjeant O'Connor, K.C. (with him, *Matheson, K.C.*, and *C. W. Corvan*), for the applicant, Captain Otway Cuffe:—

The Courts are very unwilling to allow the principal mansion-house belonging to an estate to be sold. In the case of *Marquis Camden v. Murray* (1), there were special reasons why the Court sanctioned the sale of the mansion-house, as another mansion-house had been built, which the family furnished and intended to keep up as the principal mansion-house. There is only one mansion-house attached to the Desart title, and it is inequitable that the Court should allow it to be divorced from the Desart title. The remaindermen are quite willing themselves to advance the £4000 cash necessary to complete the purchase, and to take a mortgage on the repurchased estate for that amount.

H. Wilson, K.C. (with him *E. Fitzgerald*), for Lady Kathleen Pilkington:—

In applications under section 3 (4) of the Land Act, 1903, the onus is on the tenant for life to show special circumstances why he should be allowed to retain the mansion for his own use and benefit.

There is nothing in the Act putting the onus on the remainderman. It is for the tenant for life to show circumstances to justify the Court in taking the case out of the ordinary law of the land. As regards the repairs to the mansion-house, these

(1) Hood & Challis's Conveyancing Acts, p. 543.

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were executed in 1898, when the tenant for life could not foresee the Act of 1903. Under the Settled Land Acts, the tenant for life is recouped only for re-building; Settled Land Act 1882, section 25; Settled Land Act 1890, section 13: *Rowley v. Ginner* (1). Is there any equity against Lady Kathleen Pilkington to prevent her asking that the mansion-house belonging to the estate should go with the title? This is really a contest between the daughter of the elder brother, who owned the property absolutely, and the daughter of another brother who took only by the bounty of his elder brother.

Ronan, K.C., Chaytor, K.C., and A. V. Matheson, for the Earl of Desart:—

This is a sale under the special powers of the Act of 1903, unaffected by the powers contained in the Settled Land Acts. Section 3 of the Act of 1903 was intended to give a benefit to the tenant for life. He was tenant for life before. If he is not allowed to retain the mansion-house for his own benefit, what does he gain? He still remains, as he was, tenant for life of the mansion-house. Section 3 (1) gives the tenant for life the absolute right to purchase for his own use; nothing is said about graft. Sub-section 4 imposes graft only in special circumstances. The onus is on the remainderman to show special circumstances. The only special circumstance in this case is the title, and Lord Desart is willing that, so long as the title lasts, and if his brother, the applicant, has male issue, the mansion-house should go with the title. The title is likely to become extinct soon after Lord Desart's death. There is no reason why the mansion-house should go to one set of daughters rather than to another. On these grounds we ask the Court, if it makes an order under sub-section 4, to make it on the terms that it shall only operate so far as the earldom of Desart continues.

Corvan, in reply:—

The title is a special circumstance in our favour. The Court is asked by the other side to apply the section piecemeal.

Ross, J.:—

This is an application on behalf of the Honourable Otway Seymour Cuffe, that the mansion and demesne of Desart Court should devolve in accordance with the terms of a settlement, dated 5th December, 1867, and the will of the late Earl of Desart, dated 2nd April, 1861. There is a similar application made on behalf of Lady Kathleen Pilkington.

The Desart estate has been in the hands of the Desart family since the reign of Charles 2. By a deed executed on the marriage of the late Earl of Desart in 1842, the lands were settled on the said earl for his life, with remainder to the first and every other son in priority according to birth in tail male, with remainder to the said earl. The issue of the marriage consisted of three sons—William Ulick, since deceased; Hamilton John, the present earl; and the applicant, Otway Seymour Cuffe.

By his will, dated 2nd April, 1861, the said earl devised certain woods and plantations forming part of the Desart demesne to his eldest son, William Ulick, for life, with remainder to his sons in tail, with remainder to Hamilton John for life, with remainder to his sons in tail, with remainder to the present applicant, with remainder to his sons in tail, with remainder to the sons of William Ulick in tail general, with remainder to the daughters of William Ulick.

The settlor died in 1865. William Ulick then succeeded to the earldom and estates. In a deed executed on the marriage of William Ulick, dated 15th December, 1867, the lands were settled on the said William Ulick for life, with remainder to his sons in tail, with remainder to his brother, Hamilton John, the present earl, for life, with remainder to his sons in tail, with remainder to the applicant, Otway Seymour Cuffe, for life, with remainder to his sons in tail, with remainder to William Ulick in fee. The said William Ulick had only one child, Lady Kathleen Cuffe, who married in 1895. She has two sons. On the death of William Ulick the title and estate devolved on Hamilton John, the present earl. He has two daughters, but no son. The present applicant, Captain Otway Cuffe, has been married for a considerable time, but has no son.

The present earl has sold the demesne and mansion-house to the Land Commission, but has arranged to re-purchase it for a

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sum of £20,200, of which £16,200 will be advanced by the Land Commission, and the rest, £4000 in cash, will be supplied by Lord Desart himself.

It is contended that the present earl should not be allowed to retain the demesne so re-purchased for his own use and benefit, but that, subject to such conditions as the Court may impose, it should devolve according to the limitations in the will and settlement. On the death of the late earl the present Lord Desart found the mansion-house and gardens in a somewhat neglected condition. He proceeded to have it put in a habitable state. He introduced a water-supply, and a new system of drainage. He repaired it inside and outside, and planted trees, in all expending a sum of about £3000. Further, he paid off the sum of £1000 to mortgagees who had appointed a receiver, and had power to cut and sell the timber on the estate.

There can be no doubt that Lord Desart has spent large sums in the up-keep and improvement of the mansion-house and demesne. He is very much attached to a place that has been in the occupation of his ancestors so long, and it is most natural that he should wish it to go to his own daughter in case the earldom becomes extinct, as is likely to happen.

Lady Kathleen Pilkington, on the other hand, desires the place as a residence for herself in case her husband predeceases her. There is no dower house on her husband's estate. She also states that her father spent large sums on the mansion-house, and that if it got out of repair it was not through his fault but through the fault of the agent.

I have stated all that is contained in the affidavits, which ought to be taken into consideration in determining this question. I have in *The Marquis of Ely's Estate* (1) explained what is the position of the tenant for life in relation to a settled estate. How far his position is fiduciary depends on the nature of the transaction in which he is engaged and the surrounding circumstances. What are the surrounding circumstances here? It is because he is tenant for life that he is enabled to purchase the demesne. The amount of the advance to him for such re-purchase depends on the amount of land sold to the tenants. Land Act, 1903, sect. 3 (2). He has the benefit of the public money on terms just as advan-

(1) [1904] 1 I. R. 66.

tageous as a purchasing tenant. On the plainest principles of equity, he cannot be permitted to retain for his own use property acquired by reason of the position under the settlement against the will of those claiming in remainder under the settlement.

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The Land Act of 1903 differs from the earlier Land Purchase Acts. It deals with estates and not with holdings. The tenant for life when he is selling his estate can sell the demesne also, without the leave of anybody. But when by reason of his tenancy for life he buys it back, equity will at once lay hold on the re-purchased demesne.

If sub-section 4 were not in the section, I apprehend that there would be no answer to a suit in Chancery brought by those entitled in remainder to have the new estate brought into the settlement.

What, then, is the object of sub-section 4? In the first place, it affords a cheap tribunal—a judicial Commissioner conversant with all the facts. In the next place, it compels the person entitled in remainder or reversion to elect within a prescribed time whether they will claim the new estate or not.

A re-purchased demesne is not like the bonus. The former may not be a valuable accretion to the settlement at all; the latter must be, because it is ready money. The sub-section puts the remainderman to a decision, within a prescribed time, and it relieves the tenant for life from having a possible Chancery suit hanging over him, for an unlimited time.

There may be cases where the Judicial Commissioner ought to decline to make the declaration sought. But in this case I am of opinion that I ought to declare that the re-purchased mansion-house and demesne shall devolve in accordance with the terms of the settlement affecting them at the date of the sale.

I shall require some further discussion as to the terms and conditions to be imposed to secure the sums of £4000 and £1000 advanced by Lord Desart.

Solicitor for the Hon. Otway Cuffe: *M. Buggy.*

Solicitors for Lady Kathleen Pilkington: *S. S. & E. Reeves &*

Son.

Solicitors for the Earl of Desart: *James Poe & Son.*

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AGISTMENT—Landlord and tenant—Land Acts, 1881-1886—Fair rent—Bona fide occupation.] A tenant of agricultural lands, from the time he became owner of the tenancy, let the grazing of the lands each year in agistment, and for a number of years preceding the date of the originating application the grazing tenant was not called upon to remove his cattle at the end of his term, he having then made a fresh bargain for the next year:—*Held*, that the tenant was not by such lettings necessarily debarred from having a fair rent fixed in respect of his holding. *O'Flaherty, Landlord; Kelly, Tenant* - - - APP. 223

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See JUDGMENT MORTGAGE.

ARREARS OF RENT—Will—Construction.]

Lands were limited under a testator's marriage settlement to the use of the testator for life, with remainder to his eldest and other sons in tail male with an ultimate remainder in fee to himself. The testator was the owner of other unsettled lands, in respect of which, as well as of the settled lands, there were arrears of rent owing to the testator at the time of his death. The testator by his will devised and bequeathed unto his eldest son absolutely all his "real and chattel real property, whether in possession, reversion, remainder, or expectancy," or over which he had power of disposition, "together with all rents and arrears of rents due thereout," at the time of his death. He also directed that all outgoing charges thereon, or payable thereout, at the time of his death should be paid out of such rents, and bequeathed all his personal estate not otherwise disposed of by the will upon trust for his children:—*Held*, by the Court of Appeal (*FitzGibbon and Holmes, L.JJ.*; the Lord Chancellor dissenting), reversing the decision of the Master of the Rolls, that, on the true construction of the will, the testator's eldest son was entitled to the rents and arrears of rents due out of both the settled and unsettled lands at the time of the testator's death. *In re Wills, deceased; Wills v. Wills* - - - APP. 268

— Due at date of purchase agreement—Interest on—Death of tenant for life 157, 164

See TENANT FOR LIFE AND REMAINDERMAN. 3.

— Sale of middleman's estate—Head rent—Interest on purchase-money - 63, 66
See LAND LAW (IRELAND) ACTS. 2.

ARTICLES OF ASSOCIATION—Transfer of shares—Power of directors to refuse 179
See TRANSFER OF SHARES.

ASSIGNEES IN BANKRUPTCY—Vesting of estate—Equitable interest in leaseholds - - - 334
See BANKRUPTCY.

AWARD—Labourers Act, 1906, s. 11 - 212, 301
See RECEIPT.

TENANT FOR LIFE AND REMAINDERMAN. 1.

BANKRUPTCY—*Lease—Vesting—Reversionary equitable interests in leaseholds—Election—Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 154.*] Section 145 of the Bankruptcy Act, 1849, which contained provisions similar to those contained in section 271 of the Irish Bankruptcy Act of 1857, did not affect mere equitable interests in leaseholds. *In re Deane's Trusts*

[BARTON, J., 334

BEQUEST.

See LEGACY.

BONA FIDE OCCUPATION—Agistment—
Fair rent - - - - 223

See AGISTMENT.

BONUS—*Co-owners—Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 7—Sale under provisions of—One of co-owners of estate tenant-purchaser of portion—Section 3 (2)—Section 48 (2).*] Three co-owners were entitled, in undivided shares, to an estate for their respective lives in certain lands, which were subject to an absolute order for sale. The Estates Commissioners made an offer to purchase the said lands from the Land Judge. In the schedule to the offer one of the co-owners, who held portion of the said lands as tenant from year to year under the Land Judge, was set out as tenant, and portion of the price put down in the offer for that holding was to be advanced under the Land Purchase Acts. The Estates Commissioners' offer for the entire lands on the basis of the prices in the schedule was duly accepted by the Land Judge, and the Estates Commissioners were declared the purchasers:—*Held*, that no part of the advance was for the price of "land resold to the vendor of an estate" within the meaning of sect. 48 (2) of the Irish Land Act, 1903, and accordingly, that the bonus was payable in respect of the entire advance. *In re Tyrrell's Estate*; *Bond, Petitioner* - - WYLIE, J., 152

2. — *Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48 (3)—Date when agreement for purchase entered into.*] Where, after preliminary negotiations, the Land Commission, pursuant to the provisions of sect. 6 of the Irish Land Act, 1903, made a formal proposal to purchase an estate at a specified sum, subject to certain clauses and conditions therein mentioned, and (*inter alia*) to the following clause:—"The date of the agreement to purchase shall be the date on which the Land Commission, by order, declare that the statutory conditions and the conditions of this proposal have been fulfilled, and that they agree to purchase the estate at the estimated price"—and the acceptance of the proposal was duly signed by the vendor, and lodged with the Land Commission, but the order of the Land Commission had not yet been made:—*Held*, that the above clause was of the nature of an interpretation clause, defining the meaning of the words

BONUS—continued.

"date of the agreement" where they occurred in other clauses of the proposal, and that the agreement for purchase of the estate was entered into, within the meaning of section 48 (3), on the date when the acceptance of the proposal was signed by the vendor, or, at latest, when it was lodged with the Land Commission. *In re Pollok's Estate*

[WYLIE, J., 109

3. — *Land Purchase Acts—Irish Land Act, 1903, section 48, sub-sections 1, 3—Date when agreement for purchase entered into.*] For two years prior to October, 1908, negotiations were pending between D. and the tenants on his estate, with a view to the sale of the latter to the tenants, under the provisions of the Irish Land Act, 1903. On the 9th October, 1908, D. met a deputation from his tenants, when the terms of sale were discussed and finally agreed upon, subject to ratification by the tenants themselves; and these terms were subsequently, on the 11th October, 1908, agreed to by the general body of the tenants, one of said terms being that a binding agreement for the sale should be entered into prior to the 1st November, 1908, so as to ensure to the vendor the bonus at the rate of 12 per cent. A survey of the estate was then proceeded with; but as it was impossible to complete this, and to have agreements in the prescribed form completed and signed before the 1st November, 1908, a single agreement, embodying the terms of sale which had been arrived at, was prepared by D.'s solicitor, approved of by the solicitors for the tenants, and signed by the tenants on the 29th October, 1908. This agreement was not signed by D. (who was nevertheless anxious to carry it out) until after the 24th November, 1908, on which day the Treasury published, pursuant to section 48, sub-section 3, of the Irish Land Act, 1903, notice of the revision of the rate of the percentage payable out of the Land Purchase Aid Fund. After the signing of the agreement by the tenants, the survey of the estate was proceeded with, but had not been completed, nor had purchase agreements in the prescribed form been signed, prior to the 24th November, 1908. The agreement of the 29th October, 1908, recited that one of the conditions of sale was that a binding agreement should be entered into before the expiration of five years from the passing of the Irish Land Act, 1902, so as to ensure to the vendor the full bonus of 12 per cent. upon the agreed price; and it was thereby (*inter alia*) provided that the vendor agreed to have the necessary survey of the estate made, and maps and schedules thereof prepared, and to have such agreements or other documents as might be necessary for carrying out the sale prepared, which agreements or other documents the purchasers agreed to sign within six months

BONUS—*continued.*

from the date of the preliminary agreement; that the turbary rights enjoyed by "certain of the purchasers" should be continued, and all other turbary on the estate vested in trustees to be nominated by the purchasers; that certain untenanted lands, comprising 500 acres, should be offered for sale to the Estates Commissioners, and that all evicted tenants of holdings on the estate should be reinstated in their holdings, unless such holdings had been relet to others. On a case stated by the Estates Commissioners:—*Held*, by Mr. Justice Wylie and the Court of Appeal (affirming his decision), that the agreement of the 29th October, 1908, was a purchase-agreement, sufficient to answer the terms of section 48 of the Irish Land Act, 1903, enabling *D.* (if otherwise entitled) to obtain the 12 per cent. bonus. *In re Lord Dunalley's Estate* - WYLIE, J., 338; APP. 352

4. — *Land Purchase Acts—Irish Land Act, 1903, section 48 (3)*—*Date when agreement for purchase entered into.*] By an agreement of the 1st January, 1905, *H.*, an occupying tenant, agreed with his landlord for the purchase of his holding under the provisions of the Irish Land Act, 1903, for £5010, and he applied to the Land Commission for an advance of that sum. This agreement was lodged by the vendor on the 1st March, 1905. On the 1st June, 1908, the Estates Commissioners declared the lands comprised in the vendor's originating application an estate, excluding, however, *H.*'s holding, and the purchase-money of that estate was duly allocated, with a 12 per cent. bonus, on the 26th June, 1907. On the 24th November, 1908, the Estates Commissioners made an order, refusing to sanction the advance of £5010 applied for by *H.* In December, 1908, *H.*'s landlord agreed to accept £4500 for the holding, of which *H.* agreed to pay £1500 in cash, and to apply for an advance of £3000 to the Land Commission. This agreement was reduced to writing and forwarded to the Estates Commissioners, who, by order of the 22nd December, 1908, purported to rescind their former order, and made an advance of £3000. On the 18th February, 1909, the Estates Commissioners purported to fiat the former agreement lodged by the vendor on the 1st March, 1905, subject to the modification that £3000 was advanced in lieu of £5010 therein applied for:—*Held*, by the Court of Appeal, affirming Wylie, J., that the agreement of December, 1908, was a new agreement; and that, as it was entered into after the 24th November, 1908, the vendor was only entitled to a bonus at the rate of 3 per cent. on the advance of £3000. *In re Blackwood's Estate* WYLIE, J., 382; APP. 387

5. — *Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48 (3)*—*Date when*

BONUS—*continued.*

agreement for purchase entered into—Waiver of formal proposal and acceptance.] With a view to instituting proceedings for sale of certain lands under the provisions of section 6 of the Irish Land Act, 1903, at the request of the vendor, the Estates Commissioners, on the 11th November, 1907, furnished an estimate of price, stating that it was not to be taken as an offer to purchase, and adding that if within a certain time the vendor intimated that he was willing to proceed with the sale, and took the necessary steps to initiate proceedings for sale pursuant to the provisions of the Act, the Commissioners would take such other steps as might be necessary before a formal offer to purchase could be made, and further adding that the vendor should continue his arrangements for the user of the lands until a formal proposal from the Commissioners to purchase was received by him. After further discussion by letter, on the assumption that a bonus of 12 per cent. would be payable, the vendor, on the 8th February, 1908, agreed to accept the price named. Everything required to be done by the letter of the 11th November, 1907, was done prior to the 21st November, 1908, except the signing of a formal agreement, and the furnishing of proof of *prima facie* title. On the 21st November, 1908, as the vendor was pressing the Commissioners to complete the sale, the Commissioners' surveyors entered on the lands, and lockspitted them with a view to distribution:—*Held*, that the Commissioners by their acts had waived the formal proposal and acceptance contemplated by their letter of the 11th November, 1907, and had ratified the contract already agreed to by the vendor prior to the crucial date. *In re Fetherstonhaugh's Estate* - WYLIE, J., 232

6. — *Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48, sub-s. 4—Estate—*"So circumstanced that it would . . . be sold without the consent of the owner as to price"—*Date of ascertainment.*] The date of sale is the date to be applied in considering whether an estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, within the meaning of section 48, sub-section 4, of the Land Act, 1903. An absolute order for the sale of an estate by the Land Judge was in force at the date of the passing of the Land Act, 1903, the estate being then insolvent. The petition for the sale of the estate was dismissed on 11th November, 1903. The owner subsequently took proceedings in the Land Commission, and sold the estate to the tenants under the Act of 1903. At the time of the proceedings and sale in the Land Commission the estate was solvent. *Held*, that the exceptions in section 48, sub-section 4, of the Land Act, 1903, did not apply, and that the bonus was payable. *In re Barton's Estate* - ROSS, J., 205 [APP.]

BONUS—continued.

7. — *Land Purchase Acts*—Sale of estate to tenants by Land Judge—*Irish Land Act*, 1903 (3 *Edw.* 7, c. 37), s. 48.] An estate, the subject of an absolute order for sale in the Land Judge's Court, was sold by the Land Judge to the occupying tenants, the proceedings being instituted by a proposal and application under Form 34a, the purchase-money being furnished by means of advances of money in the manner provided by section 27 of the *Irish Land Act*, 1903; but no declaration having been made by the Estates Commissioners that the estate was fit to be regarded as a separate estate for the purposes of the Act:—*Held*, by Ross, J., and the Court of Appeal, that the sale was not the sale of an estate under the Act of 1903 within the meaning of sect. 48 (1) of that Act, and that the bonus or percentage mentioned in the said section was not payable in respect of such sale. *In re Boyle's Estate; Fleuss, Petitioner*

[Ross, J., 120; App. 278]

CALLS—Following assets—Administration of shareholder's estate - - - 325
See FOLLOWING ASSETS.

CASES—*Commissioners of Charitable Donations and Bequests v. Wybrants* (2 Jones & Lat. 182) not followed - 136, 140
See LIMITATIONS, STATUTE OF. 1.

— *Drake's Estate, In re* ([1909] 1 I.R. 136, 140) distinguished - - - 390

See LIMITATIONS, STATUTE OF. 2.

— *Gillespie v. Alexander* (3 Russ. 130) distinguished - - - 325

See FOLLOWING ASSETS.

— *Greig v. Somerville* (1 R. & M. 338) distinguished - - - 325

See FOLLOWING ASSETS.

— *Hall v. Frederick* (2 P. Wms. 356) followed See ADVANCEMENT. [172]

— *Hughes v. Coles* (27 Ch. D. 231) disapproved of See LIMITATIONS, STATUTE OF. 1. [136, 140]

— *v. —* followed - - - 390

See LIMITATIONS, STATUTE OF. 2.

— *Jones v. Jones* (4 K. & J. 361) followed 374

See DOWER.

— *Mairs, Grantee; Lecky, Grantor* ([1895] 2 I.R. 475) applied to a lease for a long term of years - - - 77

See REDEMPTION OF RENT.

— *Meyler v. Meyler* (11 L.R.I. 522) not followed, having regard to subsequent authorities See ESTATE IN FEE-SIMPLE. [319]

— *Rovland v. Mitchell* (13 R.P.C. 457) followed See TRADE MARK. [32]

— *Spyer v. Hyatt* (20 Beav. 621) followed 374

See DOWER.

— *Turton v. Turton* (42 Ch. D. 128) distinguished - - - 185

See TRADE NAME.

CHARITY—Trust for—Whether express 136, [140, 390]

See LIMITATIONS, STATUTE OF. 1, 2.

COMPANY—Articles of Association—Power to refuse transfer of shares - - - 179

See TRANSFER OF SHARES.

— Calls - - - - - 325

See FOLLOWING ASSETS.

— Unregistered—Winding up - - - 49

See WINDING UP.

COMPENSATION—Labourers Act, 1906, s. 11 [212]

See TENANT FOR LIFE AND REMAINDER-MAN. 1.

COMPULSORY PURCHASE—Evicted Tenants Acts - - - - - 35

See EVICTED TENANT.

— Labourers Act, 1906, s. 11—Aggregate of award exceeding £60 - - - 212

See TENANT FOR LIFE AND REMAINDER-MAN. 1.

— Labourers Act, 1906, s. 11—Receipt for purchase-money—Aggregate of award exceeding £60 - - - 301

See RECEIPT.

— Labourers Acts, 1886, s. 16; 1896, s. 4—Scheme—Exchange of plot - 367

See LABOURERS ACTS.

CONDITION—Offer by Land Commission to purchase—Land Act, 1903, s. 7 - 41

See LAND LAW (IRELAND) ACTS. 1.

— Settlement—Residence—Absence on military service - - - - - 311

See FORFEITURE.

CONSTRUCTIVE TRUST—Action to enforce—Transfer to County Court - 46

See COUNTY COURT.

CONTINGENT DEBT—Calls—Administration of shareholder's estate - - - 325

See FOLLOWING ASSETS.

CO-OWNER—Of estate tenant—purchaser of portion - - - - - 152

See BONUS. 1.

COSTS—Administration—Estate insufficient to pay costs—Executor's costs—Costs of realization—Priority—Practice.] In an administration suit instituted by a simple contract creditor, practically the only assets consisted of a hotel, and the furniture and stock-in-trade therein. The premises were ordered to be sold. The defendant, the executrix, did not ask for carriage of the sale, which was given to the plaintiff. The funds in Court proved only sufficient to pay the costs of the executrix, after providing for the costs of allocation. The plaintiff applied to have the costs of the sale paid in priority to those of the executrix:—*Held*, that the plaintiff was not entitled to be paid out of the funds in Court the costs of

COSTS—continued.

sale in priority to the costs of the executrix.
Eisenhardt v. Talbot - - - BARTON, J., 129

2. — *Approval fee to solicitor for incumbrancer—Practice—Sale by the Court—R. S. C. 1891, Ord. LI., R. 4.*] When, in an administration suit, property is directed to be sold in lots, the solicitor for an incumbrancer on the property, who is not a party to the suit, is entitled to an approval fee of £2 2s. on each conveyance in which the incumbrancer is required to join. The practice is for the solicitor having carriage of the proceedings to pay the approval fee to the solicitor for the incumbrancer, and to be allowed the same as part of his costs out of the estate. *In re Keller; Keller v. Keller* - - - M.R. 106

3. — *Partition suit—Practice—Special costs—Form of order.*] In partition suits the general rule is that all costs properly incurred for the purpose of realization and division are paid out of the entire proceeds of sale; but where there are special costs incurred in respect of one particular share, such share must bear the whole of such special costs. *In re Mahony's Estate; Redmond and Fitzgerald, Petitioners* - - - Ross, J., 132

— *Extension of judgment—Registration as a mortgage* - - - 1, 19
 See JUDGMENT MORTGAGE.

— *Security for—Residence out of the jurisdiction* - - - 294
 See SECURITY FOR COSTS.

— *Unnecessary witnesses* - - - 185
 See TRADE NAME.

COUNTY COURT — *Transfer of action to—Practice—Claim for declaration of title—Constructive trust—Jurisdiction—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 50, s. 36).*] Where an action is brought which, while claiming a declaration of title, is in substance for the purpose of establishing a constructive trust, the Court will, under proper circumstances, transfer the action to the County Court, under the County Officers and Courts (Ireland) Act, 1877. *Sullivan v. Orpen* - - - BARTON, J., 46

DECLARATION OF TITLE—*Action for—Transfer to County Court* - - 46
 See COUNTY COURT.

DEMESNE—*Re-purchase of—Graft* - - 397
 See TENANT FOR LIFE AND REMAINDER-MAN. 2.

DIRECTORS—*Power to refuse transfer of shares—Articles of Association* - - 179
 See TRANSFER OF SHARES.

DISTRIBUTIONS, STATUTE OF—*Widowed mother dying intestate—Advancement to child* - - - 172
 See ADVANCEMENT.

DOWER—*Administration of real and personal estate—Simple contract—Creditors—Priority—3 & 4 Wm. 4, c. 104—3 & 4 Wm. 4, c. 105, s. 5.*] Notwithstanding the Administration of Estates Act, 1833 (3 & 4 Wm. 4, c. 104), and sect. 5 of the Dower Act, 1833 (3 & 4 Wm. 4, c. 105), the widow's right to dower has still priority over mere creditors of a deceased husband. *Spyer v. Hyatt* (20 Beav. 621) and *Jones v. Jones* (4 K. & J. 361) followed. *In re M^cMackin, deceased; Northern Banking Co. v. M^cMackin* - - - M.R. 374

EQUITABLE ESTATE—*Fee-simple—Absence of words of limitation—Intention of settlor* - - - 319
 See ESTATE IN FEE-SIMPLE.

— *Lease—Equitable reversionary interest in—Bankruptcy—Vesting* - - 334
 See BANKRUPTCY.

EQUITABLE MORTGAGE—*Deposit of title-deeds and map—Sale by Court—Mistake—Premises described on map not included in title-deeds—Agreement to charge all the interest of the mortgagor implied.*] The owner of a hotel deposited with a Bank, by way of equitable mortgage without writing, the title-deeds and a map of the hotel premises. The Bank transferred the equitable mortgage to S. by deed. The premises comprised in the deeds were sold by order of the Court in a suit brought by S. to raise the amount of the mortgage. On investigation of the title it appeared that part of the premises delineated on the map was not comprised in the deeds, and that the mortgagor had only a possessory title to it. The Court held that there was an agreement by the mortgagor, evidenced by the documents, including the map, to charge all his interest in the hotel premises, the benefit of which passed to S., and the purchaser being willing to take the part not comprised in the deeds without title, declared that that part was to be deemed included in the equitable mortgage, and directed a conveyance of the entire premises to be made to the purchaser. *Simmons v. Montague*

[M.R. 87]

ESTATE—*Contingent—Infant—Settled Land Acts* - - - 209
 See INFANT.

— *Declaration by Estates Commissioners—Bonus* - - - 120, 278
 See BONUS. 7.

— *Equitable—Leasehold—Bankruptcy—Vesting* - - - 334
 See BANKRUPTCY.

— *For life—Compulsory purchase—Labourers Act, 1906, s. 11—Aggregate compensation exceeding £60* - - - 212
 See TENANT FOR LIFE AND REMAINDER-MAN. 1.

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- For life—Death of limited owner—Executor
—Arrears of rent—Interest on 157, 164
See TENANT FOR LIFE AND REMAINDER-
MAN. 3.
- For life—Forfeiture - - - 1, 19
See JUDGMENT MORTGAGE.
- For life—Power to charge—Annuity by way
of pin-money - - - 1
See JUDGMENT MORTGAGE.
- In fee—Equitable—Words of limitation
See ESTATE IN FEE-SIMPLE. [319]
- Middleman's—Sale to occupying tenants—
Interest on purchase-money—Arrears of
head-rent - - - 63, 66
See LAND LAW (IRELAND) ACTS. 2.

**ESTATE IN FEE-SIMPLE—Settlement—
Real estate—No words of limitation—Intention.]**

By an indenture of settlement, dated the 3rd July, 1897, certain lands were conveyed to trustees, to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates of the persons named:—*Held*, that the Court was at liberty to look at the intention of the settlor, as evidenced by the whole deed, and that, there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee-simple. *Meyler v. Meyler* (11 L. R. Ir. 522) not followed, having regard to subsequent authorities. *In re Houston, deceased; Rodgers v. Houston*

[*WYLLIE, J. (for BARTON, J.), 319*

**ESTATES COMMISSIONERS—Declaration
of estate - - - 120, 278
See BONUS. 7.**

**EVICTED TENANT—7 Edw. 7, c. 56—Lands
proposed to be acquired compulsorily—Price.]** Where the Estates Commissioners, on the hearing of the owners' petition, fixed \$1450 as the price of certain untenanted lands proposed to be acquired compulsorily, under the provisions of the Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56), which said lands comprised 178A. 2R. 12P., the poor law valuation of which was £83 10s., and the rental prior to eviction had been, as to portion, £36 7s. 5d., and, as to other portion, a second-term judicial rent of £50; and it appeared that the said lands were being used by the owners for grazing purposes, and that they were best suited for such purposes:—*Held*, by the Judicial Commissioner, on appeal, that the sum fixed by the Estates Commissioners represented the full value of the lands. The method of ascertaining the value of such lands discussed. *In re White's Estate* - - - *WYLLIE, J., 35*
2. — 7 Edw. 7, c. 56, sect. 1 (3)—*Tenanted
land—Lands in occupation of grantee under a fee-
farm grant—Lands formerly evicted for non-pay-
ment of rent in occupation of grantee.]* Where the
grantee in a fee-farm grant made in 1890 had sub-

EVICTED TENANT—continued.

let portion of the lands therein comprised, but had since the date of the grant been in occupation of the remaining portion:—*Held*, that the latter was "tenanted land" within the meaning of sect. 1 (3) of the Evicted Tenants (Ireland) Act, 1907. Where the grantee in a fee-farm grant made in 1857, pursuant to the provisions of the Renewable Leasehold Conversion Act, had sublet portion of the lands therein comprised to a number of tenants, had evicted one for non-payment of rent prior to 1903, and had himself gone into occupation of the evicted holding:—*Held*, that the latter was not "tenanted land" within the meaning of sect. 1 (3) of the said Act. *In re Fitzmaurice's Estate; In re Armitage's Estate* - - - *WYLLIE, J., 81*

**EVIDENCE—User—Fishery - - - 237
See FISHERY.****EXCHANGE—Plot—Labourers Acts - 367
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Settlement - - - 1
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See COSTS. 1.****—Costs—Security for—Residence out of the
jurisdiction - - - 294
See SECURITY FOR COSTS.****—Of mortgagor also transferee of mortgage—
Future advances—Guarantee—Priority
See MORTGAGE. 1. [57]****—Of tenant for life—Arrears of rent due at date
of purchase agreement—Interest on
[157, 164****See TENANT FOR LIFE AND REMAINDER-
MAN. 3.****EXPRESS TRUST—Will - 136, 140, 390
See LIMITATIONS, STATUTE OF. 1, 2.****EXTENSION OF JUDGMENT—Costs—
Registration as a mortgage - 1, 19
See JUDGMENT MORTGAGE.****FAIR RENT—Agistment - - - 223
See AGISTMENT.****FEE-FARM GRANT—Eviction of sub-tenant
prior to 1903—Occupation by grantee—
7 Edw. 7, c. 56, sect. 1 (3) - - - 81
See EVICTED TENANT. 2.****FEE-SIMPLE.****See ESTATE IN FEE-SIMPLE.**

**FISHERY—Several fishery—Navigable non-tidal
lake—Public user—Prescription—Evidence—Injunc-
tion—Practice—Liberty to apply.]** The Crown is not, of common right, entitled to the soil or waters of an inland non-tidal lake, nor can any right exist in the public to fish in the waters of such a lake. A claim was made for a several eel-fishery, extending over the whole of Lough Neagh, a large, navigable, non-tidal lake in Ireland. The claim was founded on a grant by Charles 2, dated 1661,

FISHERY—continued.

and upon certain leases since made by persons claiming under the grant, and payment of rent under grant and leases was shown. The title of the Crown was established to the satisfaction of the Court by certain inquisitions had prior to the grant. As evidence of user under the grant it was proved that the Bann eel-fisheries, which were held by the same title as the Lough fisheries, were strictly preserved. There was no evidence of acts of ownership in respect of the eel-fishing in the Lough, but the grantees exercised their rights over river and Lough by means of weirs in the river, which was the ancient and recognized method of eel-fishing. The evidence showed that only in a small portion of the Lough had the fishing been protected, and convictions for trespass been obtained. On behalf of the defendants, who were fishermen, evidence was given of continuous fishing by the public from time immemorial:—*Held*, by the Court of Appeal, affirming the judgment of Ross, J., that the plaintiffs' documentary title to a several fishery in the whole of the Lough being in point of law coercive, and their user under this title being the only reasonable and profitable user, the plaintiffs' title was not displaced by the evidence of long-continued fishing by the public. There was no evidence of any damage having been done to the plaintiffs' several fishery, save by the defendants fishing with draft-nets in Toome Bay, a small portion of Lough Neagh, situate at the north-western corner, where the waters of the Lough discharge themselves into the Lower Bann River:—*Held*, also, by the Lord Chancellor (Lords Justices Fitz Gibbon and Holmes concurring with hesitation), that the injunction against the defendants should be restricted to Toome Bay, with liberty to the plaintiffs to apply in respect of any further injury to their several fishery; the concurrence of Fitz Gibbon, L.J., in the injunction so limited being based upon the assumption that, under the liberty to apply, the plaintiffs would be sufficiently protected against any further substantial damage. *O'Neill v. Johnston* — — — — — APP. 237

FOLLOWING ASSETS—Company—Administration of shareholders' estate—Action for calls after administration by the Court—Contingent debt—Pecuniary and residuary legatees—Liability.] A creditor, who neglects to prove his debt under the decree in an administration suit, can, after the suit is at end and the estate has been distributed by the Court, only recover *pro rata* from the recipients of the fund; and, if the residuary estate was sufficient to pay his debt, cannot, as a general rule, recover his debt from pecuniary legatees who were paid their legacies under the decree. But this rule does not apply to the case of a contingent creditor, who had no right to prove under the decree for his contingent debt, or for its estimated value. Such

FOLLOWING ASSETS—continued.

a creditor can, when his debt has ripened, recover from pecuniary legatees upon such terms as the Court may deem it equitable to impose. A holder of shares not fully paid up in a Company incorporated by charter died, having by her will left pecuniary legacies, and having bequeathed the residue of her estate to residuary legatees. Her estate was administered in a suit in the Chancery Division, in the course of which the pecuniary legatees were declared entitled to, and were paid, their legacies. The liability of the estate in respect of the shares was set forth in the Chief Clerk's certificate. An application was made to the Court to retain a sum to meet the contingent liability for calls upon the shares, but was refused, in accordance with the practice of the Court. After the estate had been distributed by the Court, the Company made a call. The residuary estate of the deceased shareholder had been amply sufficient to discharge the amount of the call. The Company brought an action in the Chancery Division against both the pecuniary and the residuary legatees to recover the amount of the call. The Court came to the conclusion, upon the facts of the case, and upon the true construction of the Company's charter, that the estate of the deceased shareholder continued liable for the call:—*Held* (1) that the Company was not precluded from recovering the amount of the calls from the pecuniary legatees; (2) that as the estate of the deceased shareholder had been distributed by the Court, the claim (being an equitable one) should be granted upon the terms that the residuary estate, being the primary fund for payment, should be resorted to in the first instance, and that the pecuniary legatees should be liable, if and in so far as the residuary estate might be insufficient for the purpose of meeting the plaintiffs' claim. *Gillespie v. Alexander* (3 Russ. 130) and *Greig v. Somerville* (1 R. & M. 338) distinguished. *National Assurance Co. v. Scott* BARTON, J., 325

FORFEITURE—Settled land—Tenant for life—Forfeiture for non-residence—Military service—“Refuse or neglect” to reside—Sale under Settled Land Act, 1882 (45 & 46 Vict. c. 38).] In a settlement it was provided that every person who should become actually entitled as tenant for life to the possession or receipt of the rent and profits of the lands should, for a period of six months (but not necessarily consecutively) in each year, dwell and reside in, and at all times keep in good and suitable order and condition, the mansion house, as the family residence of such person; and that if the person so entitled should at any time refuse or neglect to dwell and reside as aforesaid in, or keep in good and suitable order and condition, the said residence, the limitations therein contained to the use of such person as tenant for life should absolutely determine and become void. The tenant for

FORFEITURE—*continued.*

life was in the Royal Marines, on the active service list, and liable to be called upon to serve abroad. It was proposed to sell portion of the lands to the tenants, under the Land Purchase Acts:—*Held*, that the tenant for life was entitled to exercise the power of sale given by the Settled Land Act, 1882, without risk of forfeiture. *Held*, also, that the residence required by the condition was personal residence; but that absence from home on military or naval duty would not amount to a refusal or neglect to reside within the meaning of the condition. *In re Adair*

[WYLLIE, J. (for BARTON, J.), 311

— Life estate - - - - - 1, 19

See JUDGMENT MORTGAGE.

FUTURE ADVANCES—Executor—Mortgage

—Guarantee—Priority - - - 57

See MORTGAGE. 1.

GENERAL LEGACY—Will—Construction—

Bank shares—Subdivision of shares—Change in value—Will speaking from death—Wills Act, 1837 (1 Vict. c. 26), s. 24.] A testatrix by her will bequeathed to her executors “ten old Belfast Bank shares,” upon trust to pay the income, dividends, and profits thereof to a son of testatrix’s cousin for his life, and, subject thereto, upon trust for any widow he might leave and his children, share and share alike. At the date of the will the shares were £100 shares, of the value of £129 each. By a binding resolution of the Company it was resolved that the shares should be subdivided into ten shares of £10 each, and that the substituted shares should be called and known as “old Belfast Bank shares.” These shares were of the value of £12 13s. each at the date of her death:—*Held*, that the legacy was a general legacy, and that there being no contrary intention to exclude the operation of section 24 of the Wills Act, the legatee was only entitled to ten of the subdivided old Belfast Bank shares, or their value, to be ascertained at the testatrix’s death. *In re M’Afee; Mack v. Quirey* - - - BARTON, J., 124

GRAFT—Re-purchase of demesne by tenant for life - - - - - 397

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GUARANTEE—Payment by executor of mortgagor, also transferee of mortgage, to secure future advances—Priority 57
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HOLDING—Fair rent—Agistment—*Bona fide* occupation - - - - - 223
See AGISTMENT.

— Subject to purchase annuity—Mortgage—Restriction on—Interest—Judgment mortgage - - - - - 306

See MORTGAGE. 2.

HOTCHPOT—Widowed mother dying intestate

—Advancement - - - - - 172

See ADVANCEMENT.

HUSBAND AND WIFE—Dower - - - 374

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— Jointure - - - - - 98

See JOINTURE.

IMPROVEMENTS—Full agricultural rent—

Mode of estimating - - - 77

See REDEMPTION OF RENT.

INCUMBRANCER—Sale in Court of property

charged—Approval fee - - - 106

See COSTS. 2.

INDEMNITY—Sale subject to jointure—In-

demnifying lands unsold—Priority 98

See JOINTURE.

INFANT—*Settled Land Acts*—*Infant contin-*

gently entitled to the fee—Sale—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60.] In the case of an infant not entitled in possession during infancy, but only contingently entitled to an estate in tail on his attaining twenty-one years of age, the Court, on the application of the infant, and of the person entitled to the rents and profits of the lands pending the majority of the infant, made an order directing that the powers conferred upon a tenant for life by sections 3 and 4 and 16 to 20 of the Settled Land Act, 1882, might be exercised by the next friend of the infant on behalf of the infant during his minority. *In re Brabazon’s Estate*

[ROSS, J. (for BARTON, J.), 209

INFRINGEMENT—Trade mark—Particulars

See TRADE MARK. [32]

INJUNCTION—Labourers Act—Compulsory

purchase—Payment into Court - 367

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— Promotion of railway—Guarantee—Increase

of liability—Plaintiff administrator resi-

dent out of the jurisdiction - 294

See SECURITY FOR COSTS.

— Trespass to several fishery—Liberty to apply

See FISHERY. [237]

— Trade name—Fraudulent imitation of—Mis-

leading addition - - - 185

See TRADE NAME.

INTENTION—Settlor—Equitable estate in fee

See ESTATE IN FEE-SIMPLE. [319]

INTEREST—On arrears of rent due at date of

purchase agreement—Tenant for life—

Death of - - - - - 157, 164

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— On mortgage—Holding subject to purchase

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— On purchase-money—Sale of middleman’s

estate—Arrears of head-rent - 63, 66

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INTESTACY—Mother—Advancement - 172

See **ADVANCEMENT**.

JOINTURE—*Landed Estates Court—Lands comprised in absolute order for sale, subject to contingent jointure—Portion of lands sold subject thereto, but indemnified by other portion not then sold—Subsequent sale of the other portion discharged from jointure—Rights of jointress as against prior incumbrancers.*]

Where lands are conveyed by Landed Estates Court conveyance, subject to an annuity, but indemnified against same by other lands comprised in the absolute order for sale, the indemnity so created must be made effective as against the lands liable thereto, notwithstanding the fact that incumbrancers thereon having priority to the annuity are thereby prejudiced. In 1879 and 1880 the estate of *E. H. R.* was put up for sale in the Landed Estates Court in fifty-one lots, under conditions of sale which provided (*inter alia*) that each of lots 1 to 46 would be sold subject to the entire of a jointure rentcharge payable to the wife of the owner for her life in the event of her surviving him, but indemnified against payment of any part of same by lots 47 to 51, which would be sold by the Court primarily liable to bear the same in certain proportions. Twenty-nine lots were sold at the time, and were conveyed to the respective purchasers, in accordance with the above condition. *E. H. R.* died in 1896, leaving his wife him surviving. In 1906 proceedings for the sale of the lands comprised in the remaining lots, including the indemnifying lots, under the Land Purchase Acts, were commenced, but the estimated purchase-money was insufficient to discharge the incumbrances having priority to the jointress. In 1907, the jointure being in arrear, the jointress instituted the action of *Rowe v. Gough and Others* in the Chancery Division to raise her jointure, naming the purchasers of lots 1 to 29 as defendants. Thereupon, in *Rowe's Estate* ([1907] 1 I. R. 380), on the application of the purchasers, Ross, J., being of opinion that the purchasers, by their conveyances, obtained a charge by way of indemnity on lots 47 to 51 in priority to the incumbrancers, made an order directing the receiver to apply the rents and profits of lots 47 to 51 in relief of the indemnified purchasers. On appeal from this order, the Court of Appeal, being of opinion that no money would be payable in respect of the jointure, or any indemnity provided in respect of it, out of any of the lands subject to the said jointure, until it was seen by the result of the sale of the estate what moneys (if any) were properly applicable to meet the said jointure, and any arrears thereof, after providing for prior incumbrances, discharged the order of Ross, J. ([1907] 1 I. R. 388). The defendants in *Rowe v. Gough and Others*, who had admitted liability, thereupon obtained leave to

JOINTURE—*continued.*

amend their defence in accordance with the terms of the order of the Court of Appeal, and, on the hearing of the action, Kenny, J., made an order declaring the jointure well charged, and directing certain inquiries, but refused to appoint a receiver or direct the sale of the lands, and declared his order to be without prejudice to such rights as the order of the Court of Appeal declared to exist in favour of unpaid incumbrancers in *Rowe's Estate* ([1908] 1 I. R. 402). The jointress appealed from the latter part of the order, but the Court of Appeal held that the appeal could not be allowed consistently with their former order ([1908] 1 I. R. 411). On appeal to the House of Lords: (1) the order of the Court of Appeal in *Rowe v. Gough and Others* was reversed, and the order of Kenny, J., was varied by discharging the latter part of the order, and by making an order for the appointment of a receiver over the rents and profits of the lands, for the purpose of discharging the jointure: and (2) the order of the Court of Appeal in *Rowe's Estate* was reversed, and the order of Ross, J., was restored. *Rowe v. Gough; Gough v. Bolton*

[H. L. 98

JUDGMENT—Administration action—Payment by executor under guarantee—Transferee of mortgage for future advances - 57
See **MORTGAGE**. 1.

— Extension—Registration as a mortgage 1, 19
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— Registered as mortgage.

See **JUDGMENT MORTGAGE**.

JUDGMENT MORTGAGE—*Settlement—Life estate subject to overriding power of appointment—Exercise of power—Effect—Life estate made determinable on happening of certain events—Forfeiture—Power to charge—Charge of eight years' arrears of pin-money—Registration of judgment mortgage—Validity of—English judgment extended to Ireland under Judgments Extension Act, 1868 (31 & 32 Vict. c. 54); sect. 4, "execution"; sect. 1, costs of obtaining and registering certificate—Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), sect. 6—Affidavit of judgment—Omission therefrom of costs of obtaining and registering certificate.*] By settlement made in 1886, *J. C.*, father of *A. C.*, and *A. C.*, granted certain lands to trustees, to such uses as *J. C.* and *A. C.* should jointly appoint, and in default of and until such appointment, to the use of *J. C.* for life, and on his death to the use of *A. C.* for life, with remainder over. By indenture made in 1888 *A. C.*, for valuable consideration, conveyed to *J. C.* all the estate, interest, and remainder of him the said *A. C.* expectant on the determination of the life estate of *J. C.* in the said lands. Upon the marriage of *A. C.* in 1890 two settlements were executed—(1) A settlement whereby *J. C.* granted, and *J. C.* and *A. C.*, in the

JUDGMENT MORTGAGE—continued.

exercise of the joint power of appointment vested in them by the settlement of 1886, appointed and confirmed the said lands unto *A. C.* after the death of *J. C.*, to the use of *A. C.* for life, or until the happening of certain events—one of which was, if he should, either wholly or partially, assign, charge, or alienate his estate or interest in the premises, except as thereafter mentioned with regard to pin-money; and another of which events was, if he should suffer any judgment mortgage to be registered so as to affect such estate or interest—and from and after the determination of the said estate upon any of such events during the life of *A. C.*, the said lands were limited upon trust, during the joint lives of *A. C.* and his wife, to pay the income thereof to his said wife for her separate use; and it was thereby provided that it should be lawful for *A. C.*, after the death of *J. C.*, to charge his life estate with payment to his said wife during their joint lives, by way of pin-money, of an annual sum not exceeding £200, and that no such charge should cause a cesser of the life estate of *A. C.*; and (2) a settlement whereby the wife's fortune was settled, and under which *A. C.* covenanted that on the decease of *J. C.* he would forthwith, by some effectual instrument, secure to his said wife out of his life income from the said lands a yearly annuity of £200 during their joint lives, by way of pin-money. *J. C.* died in 1893. In 1902 *A. C.* executed a deed whereby he charged, as from the death of *J. C.*, all his life estate in the said lands, and the rents and profits thereof, with payment of the yearly annuity of £200 to his said wife, by way of pin-money, during their joint lives; and by the same deed *A. C.* admitted that eight years' arrears of said annuity were due at that date, which he thereby covenanted to pay. In June, 1902, a judgment was recovered in the King's Bench Division in England against *A. C.*, for the sum of £990 debt and £6 19s. costs. The said judgment was subsequently extended to Ireland under the Judgments Extension Act, 1868, and was, in 1903, registered as a judgment mortgage against the interest of *A. C.* in the said lands. The affidavit of judgment contained no reference to the costs of registering the judgment in Ireland:—*Held*, by Wylie, J., (1) that *A. C.* had still vested in him, under the settlement of 1886, by virtue of the Settled Land Acts, power to sell the said lands, and (2) that the deed of charge of 1902 was not an excessive exercise of the power to charge an annuity by way of pin-money, and did not cause a cesser of the life estate of *A. C.* under the first-mentioned settlement of 1890; but *held*, by the Court of Appeal (affirming the judgment of Wylie, J.), (3) that an English judgment extended to Ireland under the Judgments Extension Act, 1868, can be registered as a judgment mortgage,

JUDGMENT MORTGAGE—continued.

and that the omission from the affidavit of judgment, made for the purpose of such registration, of the costs of obtaining and registering in Ireland the certificate of the entry of the judgment does not invalidate the registration of the judgment mortgage, and, accordingly, that, on the registration of the judgment mortgage in 1903, the life estate of *A. C.* under the first-mentioned settlement of 1890 determined. *In re Cleland's Estate*

[WYLIE, J., 1; APP. 19]

— Holding subject to purchase annuity - 306
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JURISDICTION—County Court—Transfer to—
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— Estates Commissioners—Exclusive—Declaration of Estate - - - 120, 278
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— Land Commission—Appointment of trustees of term - - - 169
See TRUSTEE.

— Land Commission—Land Law (Ireland) Act, 1896, s. 35 (2)—Interest on purchase-money—Sale of middleman's estate—Arrears of head rent - - - 63, 66
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— Residence out of - - - 294
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— Unregistered Company—Winding up 49
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LABOURERS ACTS—Improvement scheme—

Exchange of plot—Part of old plot included in new—Lodgment of purchase-money in bulk sum—Right of entry—Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 69), s. 16—Labourers (Ireland) Act, 1896 (59 & 60 Vict. c. 53), s. 4—Trespass—Injunction.]
Where under section 16 of the Labourers (Ireland) Act, 1886, the Local Government Board have authorized an exchange of any site and plot, included in a scheme, for another site and plot of equal area, such exchange is not invalidated by the inclusion in the new site and plot of a portion of the old. The provisions contained in section 4 of the Labourers (Ireland) Act, 1896, under which the sanitary authority may enter upon the lands comprised in an Order, are not satisfied by the lodgment in the Bank of Ireland in one bulk sum of the sum directed by the Local Government Board to be lodged in respect of the scheme. To enable a sanitary authority to enter upon any plot comprised in a scheme, the specified sum authorized by the Local Government Board in respect of such plot must be separately lodged. Where a Provisional Order has been made by the Local Government Board at the request of a Rural District Council, sanctioning a scheme which has been acted on, the Local Government Board is seised of jurisdiction, and can, under sect. 16 of the

LABOURERS ACTS—*continued*.

Labourers (Ireland) Act, 1886, amend the scheme although the resolution requesting the amendment is subsequently rescinded, and although the Order has become confirmed by the efflux of the statutory period. *Hosford v. O'Regan*

[Ross, J. (for BARTON, J.), 367 [REV.]

— Aggregate of award exceeding £60 212, 301

See RECEIPT.

TENANT FOR LIFE AND REMAINDERMAN.

LAND COMMISSION—Offer to purchase—Land Act, 1903, s. 7 - - 41

See LAND LAW (IRELAND) ACTS 1.

LAND JUDGE—Sale to tenants by—Form No. 34A—Bonus - - 120, 278

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LAND LAW (IRELAND) ACTS—*Irish Land*

Act, 1903, sect. 7—Offer by Land Commission to purchase—Conditional offer.] The offer by the Estates Commissioners, purporting to be made pursuant to section 7 of the Irish Land Act, 1903, for the purchase of an estate for sale in the Land Judge's Court, must be an offer capable of immediate acceptance, and one which will enable a test to be applied as between the offer and a subsequent sale by the Land Judge under the provisions of the section. Therefore, where an offer by the Estates Commissioners, purporting to be made under the said section, was made subject to the condition that the Estates Commissioners should be able to obtain undertakings in the prescribed form from persons approved of by them to re-purchase the lands at the prices set out in the schedule to the offer:—*Held*, that the offer was not an offer within the meaning of the section. *In re Williams' Estate; Armstrong, Petitioner* - - Ross, J., 41

2. — *Landlord and tenant—Sale of middleman's estate to occupying tenants—Arrears of head-rent—Interest in lieu of rent—Jurisdiction, Land Commission—Land Law (Ireland) Act, 1896, s. 35 (2)—Landlord and Tenant Act, 1860, s. 20—Purchase of Land Act, 1885, s. 10.*] Where a middleman had entered into agreements with his tenants for the sale of their holdings under the provisions of the Land Purchase Acts, and the head-rent had fallen into arrear, the head landlord applied for an order that the interest payable by the occupying tenants in lieu of rent, under sect. 35 (2) of the Land Law (Ireland) Act, 1896, be paid to him in discharge of the arrears and future accruing gales of head-rent before any payment should be made to the middleman as vendor;—*Held*, by Wylie, J., that the head landlord came within the equity of sect. 35 (2) of the Land Law (Ireland) Act, 1896, and that he had jurisdiction to make the order. *Held*, by the Court of Appeal (reversing the order of Wylie, J.), that the head landlord did not come within the words "or such other person as may prove him-

LAND LAW (IRELAND) ACTS—*continued*.

self entitled thereto" in the section, and that therefore the order could not be made. *Held*, also that section 10 of the Land Purchase Act of 1885 did not apply. *Held*, also, by FitzGibbon and Holmes, L.JJ., that the head landlord could not adopt the procedure introduced by sect. 20 of the Landlord and Tenant (Ireland) Act, 1860. *In re Cavanagh's Estate* - WYLIE, J., 63; APP. 66

— Arrears of rent due at date of purchase agreement—Interest on—Death of tenant for life - - - 157, 164

See TENANT FOR LIFE AND REMAINDERMAN. 3.

— Bonus.

See BONUS.

— Evicted Tenants Acts.

See EVICTED TENANT.

— Fair rent—*Bona fide* occupation—Agistment See AGISTMENT. [223

— Holding subject to purchase annuity—Restriction on mortgaging—Judgment mortgage—Arrears of interest - 306

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— Redemption of Rent Act - - - 77

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— Re-purchase of demesne—Tenant for life—Graft - - - 397

See TENANT FOR LIFE AND REMAINDERMAN. 2.

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— Trustees of term—Appointment of - 169

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LANDLORD AND TENANT—Agistment

See AGISTMENT. [223

— Land Law (Ireland) Acts.

See LAND LAW (IRELAND) ACTS.

— Lease—Equitable interest in—Bankruptcy—Vesting - - - 334

See BANKRUPTCY.

— Lease—Long term of years—Principle of *Mairs v. Lecky* ([1895] 2 I.R. 475) applied to - - - 77

See REDEMPTION OF RENT.

— Sale of middleman's interest to occupying tenants—Head-rent—Interest in lieu of rent—Jurisdiction, Land Commission 63, See LAND LAW (IRELAND) ACTS. 2. [66

LEGACY—Arrears of rent—Settled and unsettled property of testator - - - 268

See ARREARS OF RENT.

— General—Bank shares—Subdivision—Wills Act, 1837, s. 24 - - - 124

See GENERAL LEGACY.

— Payment of, in administration action—Calls on shares held by testator—Liability of legatee - - - 325

See FOLLOWING ASSETS.

LIMITATION, WORDS OF.

See ESTATE IN FEE-SIMPLE.

LIMITATIONS, STATUTE OF—3 & 4 Wm.

4. c. 27, ss. 2, 25; 37 & 38 Vict. c. 57, ss. 1, 10—*Charity—Rent—Express trust.*] A testatrix, the predecessor in title of the vendor in this matter, died in 1811, having first made her will, by which she devised her real estate, including lands in county Kildare, to trustees and their heirs, subject to certain annuities, upon trust to permit *G.D.* to take the rents thereof for his life, with remainder upon trust and to the use of his first and other sons in tail male, with remainder to his daughters in tail general, with limitations over. The testatrix, after devising certain annuities, which she charged upon portion of her Kildare estate, directed her trustees to raise the amount of certain legacies bequeathed by her, and also a sum of £3000 for the erection of a mansion-house by a sale of timber on portion of her real estate, and to levy any deficiencies by a sale or mortgage of a competent part of her other property, her Kildare estate to be first resorted to after the sale of the timber. By a codicil to her will the testatrix directed that all her yearly subscriptions to the Ross and Waterford charities should be for ever continued, the Waterford charities (which comprised those in question in the present case) to be paid out of the part of her estate bequeathed to the *W.s* (i.e., the Kildare estate); and, by a further codicil, she directed that her Stokestown estate should for ever continue her subscriptions to the several Ross charitable institutions, and that the like subscriptions “be for ever paid out of my county Kildare [*sic*] to my several Waterford charitable institutions.” By a report of a Master in Chancery, made in a suit to administer the estate of the testatrix, her subscriptions to the Waterford charities, being certain annual payments formerly made by the testatrix to charitable institutions in Waterford, amounting in all to £14 4s. 10½d. yearly, were ascertained and declared to be perpetual charges on the said lands of Kildare. A sale of the said lands having been effected, under the provisions of the Irish Land Act, 1903, a question arose on allocation of the purchase-money as to the existence of three of the charges, no payments on account of them having been made for more than twenty-five years prior to the date of the agreement for sale:—*Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that the charges were barred by the Statutes of Limitations. (Section 2 of the Real Property Limitation Act, 1833, as amended by section 1 of the Real Property Limitation Act, 1874.) *The Commissioners of Charitable Donations and Bequests v. Wybrants* (2 J. & Lat. 182) not followed. *Hughes v. Coles* (27 Ch. D. 231) disapproved of. *In re Drake's Estate* - - WYLIE, J., 136; APP. 140

LIMITATIONS, STATUTE OF—continued.

2. — 3 & 4 Wm. 4, c. 27, ss. 2, 25; 37 & 38 Vict. c. 57, ss. 1, 10—*Charity—Rent—Express trust.*] A testator devised all his real estate to two trustees and their heirs, to the use of the trustees for a term of years, and, subject thereto, upon trust, after testator's death, to convey said real estate to the use of his brother for life, with remainders over, and directed his trustees, previously to or by the settlement in his will directed, to charge a competent part of his said estate, called the *D* estate, with the perpetual payment to the poor of five specified parishes of a clear annual sum of an amount to be ascertained as in his will directed, but not less than £22, *such annual sum to be annually distributed by the possessor of the D. estate for the time being for the benefit of the poor of the said parishes in such manner as such possessor should think fit.* The trustees, in pursuance and performance of the trust reposed in them, by a settlement, duly conveyed the lands to the uses directed by the will, subject, as to the mansion-house of *D.* and the park and demesne lands, to the perpetual payment of the said annuity, as by the will directed. No payment had been made in respect of this annuity for over forty years, and there was no evidence that any payment had ever been made in respect of it:—*Held*, that the annuity was secured by an express trust, within the meaning of section 25 of 3 & 4 Wm. 4, c. 27, and was not barred; but that all past gales of the annuity were barred by section 10 of 37 & 38 Vict. c. 57. *In re Drake's Estate* (*ante*, p. 136) distinguished. *Hughes v. Coles* (27 Ch. D. 231) followed. *In re Earl of Montall's Estate*

[WYLIE, J., 390]

3. — *Mortgage—Acknowledgment in writing after bar of statute.*] Certain lands were subject to a mortgage. Since 1884 no payment had been made by the mortgagor in respect of interest or principal. The mortgagor died in 1905, and his executrix, in Schedule B, set out the mortgage as an existing incumbrance, but did not set it out in Schedule A, among the debts due by the deceased. In an action by the assignee of the interest of the mortgage against the executor of the mortgagor for the administration of the real and personal estate of the mortgagor:—*Held*, that the mortgagee's title to the land being after the expiration of the statutory period extinguished, the subsequent acknowledgment, assuming it to be a good acknowledgment, was of no avail to revive either the charge on the land or the covenant in the mortgage. *Beamish v. Whitney* - ROSS, J., 360

LOCAL REGISTRATION OF TITLE—

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but exceeding £60 in the aggregate 301
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- MAP**—Deposited with title-deeds—Premises in map not included in deeds - 87
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- MIDDLEMAN**—Sale to occupying tenants—Head rent - - - 63, 66
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- MILITARY SERVICE**—Clause in will requiring residence—Refusal or neglect 311
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- MISDESCRIPTION**—Trade name—Misleading addition - - - 185
See **TRADE NAME**.
- MORTGAGE**—*Future advances*—*Transfer of mortgage debt*—*Executor of mortgagor transferee of mortgage*—*Administration of assets*—*Secured creditor*—*Priority*.] The transferee of a mortgage made to secure present indebtedness and future advances became, on the death of the mortgagor, the executor of the latter, and a party to a suit to administer the mortgagor's estate. After the date of the judgment for administration the executor was compelled to pay, under a guarantee, a debt due by the deceased mortgagor, and thereupon claimed to rank as a secured creditor against the lands comprised in the mortgage under the said mortgage, and the transfer thereof to him:—*Held*, affirming the decision of Barton, J., that, notwithstanding the payment having been made subject to the judgment for administration, the executor was entitled to rank as a secured creditor in respect of the sum so paid by him. *Gannon v. Gannon* - - - APP. 57
2. — *Land Purchase Acts*—*Irish Land Act, 1903* (3 Edw. 7, c. 37), s. 54 (3)—*Holding subject to land purchase annuity*—*Restriction on mortgaging*—*Mortgage in excess of limit*—*Arrears of interest*—*Judgment mortgage*.] Section 54, sub-section 3, of the Irish Land Act, 1903, only extends to a mortgage or charge by the voluntary act of the proprietor, and does not invalidate a judgment mortgage, no matter what the amount of the prior charges on the holding may be. *Semble*: The limit imposed by the sub-section applies only to capital charges; and when the interest on a capital charge which exceeds the limit has fallen into arrear, there is nothing in the sub-section to invalidate the claim for interest on the limited amount of principal. Restrictions on alienation and charging by evicted tenant-purchasers discussed. *In re Rouleston*
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- NEXT-OF-KIN**—*Will*—*Construction*—“*Next-of-kin and nearest heir of my name and family*.”] A testator by his will disposed of his property, which consisted of both real and personal estate, amongst his children, and provided that if they should die without issue such property should go “to my next-of-kin and nearest heir of my name and family”:—*Held*, by Barton, J., and the Court of Appeal, that upon the death of testator's children without issue his personal estate went to his next-of-kin, to be ascertained at his death, and that his real estate went to his eldest son, who was at his death his nearest heir of his name and family. *In re Maher, Deceased; Maher v. Toppin*
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RECEIPT—Local Government Board—Labourers Acts—Arbitrator—Award—Compulsory taking of lands—Compensation over £60—Registration of title—Receipts for sums under £60—Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37), s. 11.] Lands were compulsorily taken for the purposes of an improvement scheme under the Labourers Acts, and the arbitrator of the Local Government Board awarded to the owner three sums of £38, £36, and £33, in respect of three parcels of land, held by the owner under the same title. The owner gave to the Rural District Council three several receipts purporting to be pursuant to section 11 (4) of the Labourers (Ireland) Act, 1906. The Rural District Council having, pursuant to the provisions of section 21 of the said Act, transmitted the receipts to the registering authority, under the Local

RECEIPT—continued.

Registration of Title Act, 1891, the Registrar of Titles declined to receive the receipts as evidence of title, on the ground that section 11 of the Labourers (Ireland) Act did not apply. On appeal to the High Court:—*Held* (affirming the decision of the Registrar of Titles), that, inasmuch as the purchase-money payable to the owner for his interest in the land acquired exceeded £60, section 11 of the Labourers (Ireland) Act, 1906, which makes receipts given pursuant to its provisions effectual to vest title, did not apply. *In re Delvin Rural District Labourers Order*, 1906

[MADDER, J., 501

REDEMPTION OF RENT—54 & 55 Vict. c. 57—“Full agricultural rent”—Mode of estimating—Buildings and other improvements—Tithe rentcharge.] The principle of *Mairs v. Lecky* ([1905] 2 I.R. 475) applies to long terms of years. In ascertaining whether a reserved rent is a full agricultural rent on an application under the Redemption of Rent (Ireland) Act, the Land Commission is not bound to act on the assumption that all improvements on the holding were made or acquired by the landlord, and ought to take into consideration any tithe rentcharge payable by the tenant. *Bernard, Landlord; Moore, Tenant*

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SECURITY FOR COSTS—*Practice*—*Residence out of jurisdiction*—*Plaintiff suing as administrator*—*R.S.C., 1891, Order XXIX., Rr. 1, 3.*] A plaintiff suing as executor or administrator, if out of the jurisdiction, is subject to the same liability to give security for costs as if he was suing in his own right. An administrator with the will annexed of an Irish testator brought an action to restrain the promoters of a Railway Company in Ireland from proceeding with a Bill in Parliament to extend the time for making the railway, and to prevent them increasing the liability of the testator's estate on a guarantee, given by him and the defendants to a Bank, to repay money advanced for the purpose of making the Parliamentary deposit required to be made in such cases. The plaintiff, who was a beneficiary under the will, resided in New York, and had no property of his own in Ireland, but there were considerable assets of the testator in Ireland unadministered. The Court, being of opinion that the defendants had made a satisfactory affidavit of merits, made an order that the plaintiff should give security for costs, and measured the amount of £100. *Wheelan v. Irwin* [M.R. 294]

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TENANT FOR LIFE AND REMAINDER-

MAN—Compulsory taking of lands—Compensation over £60—Local Government Board—Arbitrator—Award—Payment out of Court—Tenant for life of settled estate—Trustees—Labourers Act, 1906 (6 Edw. 7, c. 37)—Lands Clauses Consolidation Act, 1845, ss. 69–72, 81.] Lands were being compulsorily taken for the purpose of an improvement scheme under the Labourers Acts, and the arbitrator of the Local Government Board awarded an aggregate sum exceeding £60 as compensation for five plots in respect of the interest of the lessor of a lease under which the lands were held. The tenant for life of the lands under a settlement claimed the whole sum, on the ground that it was made up of five several sums, payable as compensation for five separate plots, each less than £60:—*Held*, that the compensation awarded was payable to the trustees of the settlement, and not to the tenant for life, under section 11 of the Labourers Act, 1906. *In re Abbeyleix Rural District Council and White* - - - M. R. 212

2. — Land Purchase Acts—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 3, sub-s. 4—*Re-purchase of demesne by tenant for life—Graft.*] The tenant for life of an estate, under the terms of a will and a re-settlement, sold the agricultural portion of the estate to the tenants, under the Land Act, 1903. The Land Commission purchased the demesne for the purpose of re-sale to the vendor, who re-purchased the same for the sum of £20,200, representing the full value of the demesne, of which the sum of £16,200 was to be repaid by a purchase annuity, and the balance (£4000) was to be paid in cash by the vendor, in whom the demesne was, on the 24th June, 1909, vested in fee-simple. The remaindermen having made application, under section 3, sub-section 4, of the Land Act, 1903:—*Held*, that they were entitled to an order declaring that the land so re-sold should devolve in accordance with the terms of the settlement which, at the date of the sale to the Land Commission, affected it. *In re Earl of Desart's Estate* - - - Ross, J., 397

3. — Settled land—Death of tenant for life—Rights of his executor—Sale to tenants—Arrears of rent due at date of agreements for purchase—Interest on—Land Law (Ireland) Act, 1896, s. 35, sub-s. 2—Irish Land Act, 1903, s. 24, sub-s. 8.] Where, upon the sale of a settled estate through the Irish Land Commission, arrears of rent are due to the tenant for life at the date of the purchase agreement, in the event of his death before allocation, his personal representative is entitled to the interest on the sum payable in respect of those arrears under section 24, sub-section 8, of the Irish Land Act, 1903. *In re Viscount Ashbrock's Estate*

[WYLLIE, J., 157; APP. 164]

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TRADE MARK—*Infringement of—Practice—Particulars—Rules Supreme Court (Ireland), 1891, Order XIX., Rule 7.]* If the defendant, in an action for infringement of a trade mark, pleads that the plaintiff's trade mark is invalid, he must give particulars of the invalidity alleged. *Rowland v. Mitchell* (13 B. P. C. 457) followed. *Grosvenor Chemical Co. v. Greenfield* - - M. R. 32

TRADE NAME—*Untrue description—Trader's own name with misleading addition—Injunction—Costs—Unnecessary witnesses subpoenaed but not examined.]* The plaintiffs, a firm of horticulturists, had traded for over fifty years under the name of *Alexander D. & Sons* in the North of Ireland. In 1900 they were incorporated as a joint stock company, as *Alex. D. & Sons, Limited*, and in the following year opened a shop in Dublin. They acquired a considerable reputation as growers and propagators of roses and garden seeds, thereby rendering (as was admitted) their trade name of high commercial value. The defendant, whose name was *Alexander D.*, was established in Dublin from 1875 as a trader in the heavy seed (non-horticultural) business, and, about 1897, opened a shop in Capel Street as "The Ashbourne Agricultural Company." Two years later he put the name "*Alexander D., proprietor*," on the sign-board. He subsequently moved the business to a house in Parliament Street, where it was carried on as the "Ashbourne Agricultural Company," without any addition of the proprietor's name. This continued until February, 1907. In 1905 the defendant purchased ground near Dublin, which he turned into a nursery for roses and other plants, advertising it as "The Home of the Rose." He had two sons, one employed as an assistant at the house in Parliament Street, the second at the nursery—neither being in partnership with him. The plaintiffs having gone into the agricultural seed business, and obtaining a Government contract for it when the defendant made an unsuccessful tender, he, admittedly by way of reprisal, advertised as a rose-grower and horticulturist at the nursery address as "*Alexander D. & Sons*," as well as for potatoes and heavy seed business, under that title and at that address, while he continued in the same papers advertisements as the "Ashbourne Agricultural Company" at Parliament Street. He also answered a "trap" letter ordering roses of other growers' introduction, by offering to comply with the order at a sub-

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TRADE NAME—*continued.*

sequent date; and, as the result of a large body of evidence, oral and documentary, the Court being of opinion that the defendant had designedly attempted, by the addition of the words "& Sons," to use a trade designation untrue in fact, as the sons were not partners, to lead the public to believe that his business, and the roses and other plants sold by him, were those of the plaintiff Company, affirming the judgment of the Master of the Rolls, granted an injunction restraining the defendant from carrying on business as *Alexander D. & Sons*; but varying the order of the Master of the Rolls appealed from, so as to permit the defendant to carry on business under his own name as *Alexander D. Turton v. Turton* (42 Ch. D. 128) distinguished. The Court being of opinion that, notwithstanding the pleadings, the extensive and valuable trade reputation which the plaintiff Company enjoyed was not really in controversy; and, having regard to its admission by defendant's counsel at the opening of the trial, dismissed a cross-appeal by the plaintiff Company from portion of the judgment of the Master of the Rolls disallowing the costs of witnesses on this question who were subpoenaed but not examined. *Dickson v. Dickson* - - - App. 185

TRANSFER OF SHARES—*Company—Directors—Articles of Association—Power to refuse transfer.]* Where the registration of a transfer of shares in a Company is (under the articles of association) subject to the approval of the transferee by the directors, the fact that the proposed transferee is already a shareholder does not entitle him to have the transfer registered as matter of course; but it is discretionary with the directors to register the transfer to him or not, and, in the absence of evidence that the directors have acted *mahi fide*, their refusal to register cannot be questioned. *In re Dublin North City Milling Company* - - - M. R. 179

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TRUSTEE—*Land Purchase Acts—Practice—Appointment of trustees under the Trustee Act, 1893—Jurisdiction of Land Commission—Land Law (Ir.) Act, 1896 (59 & 60 Vict. c. 47), s. 33 (1)—Purchase of Land (Ir.) Act, 1885 (48 & 49 Vict. c. 73) s. 10.]* Where certain lands and

2 I

TRUSTEE—*continued.*

hereditaments, including a fee-farm rent payable out of an estate sold under the Land Purchase Acts, were subject to a term of years, the trusts of which were to raise a certain sum thereby secured, the Judicial Commissioner appointed trustees of the said term of years for the purpose of receiving the redemption value of the said fee-farm rent, and also for the purpose of receiving the redemption value of any of the property comprised in the said term of years which might thereafter be the subject of proceedings under the Land Purchase Acts. *In re Battersby's Estate* - WYLIE, J., 169

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Industrial and Provident Societies Acts (15 & 16

Vict. c. 31; 56 & 57 Vict. c. 39).] A petition was

presented for the compulsory winding up of a

Company which was registered under the Industrial

and Provident Societies Act, 1893. The Company

WINDING UP—*continued.*

was not registered under the Companies Acts, and was in voluntary liquidation. The assets were small, but easy to realize. There was no question of difficulty to be investigated. The majority of the creditors were in favour of continuing the voluntary winding up:—*Held*, that the Court had jurisdiction either to make an order for compulsory winding up, or continuing the voluntary winding up under the supervision of the Court, or of dismissing the petition altogether; and that, under the circumstances, the Court would dismiss the petition, and allow the voluntary winding up (without supervision) to continue. *In re Belfast Tailors' Co-partnership* - - - - - M.R. 49

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